(b)

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SHORT TITLE Evans, Wilbert L.
VERSUS Virginia

DOCKETED: Jan 29 1985

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	**********

1-42

84-1224

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WILBERT LEE EVANS,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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QUESTIONS PRESENTED

1. Does it violate the *ex post facto* clause of the United States Constitution to apply a newly amended death penalty statute as a basis for resentencing to death a defendant whose original death sentence was vacated under circumstances where the defendant would have received a life sentence under the law in effect when he was tried?

2. Is the equal protection clause of the United States Constitution violated when defendant receives a death sentence that, but for the state's conscious delay in confessing error, would have been reduced to the life sentence that similarly situated defendants received?

3. Are a defendant's due process rights violated by a jury instruction that a sentence of life imprisonment must be reached unanimously when the state's death penalty statute specifically requires a unanimous vote solely for the death penalty but not for life imprisonment?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No.

WILBERT LEE EVANS,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Petitioner Wilbert Lee Evans prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Virginia entered in this case.

OPINIONS BELOW

The Supreme Court of Virginia affirmed the death sentence of Wilbert Lee Evans after the trial court decided to permit resentencing after Evans' original death penalty was vacated (*Evans II*). The opinion, which is unreported, is set forth in the Appendix ("App.") at 1a-15a. The trial court's order sentencing Evans to death is set forth at App. 16a-18a. The trial court's order that Evans was to be resentenced, and that resentencing was not unconstitutional, is set forth at App. 19a-21a. The Supreme Court of Virginia's opinion affirming Evans' conviction and his initial death sentence (*Evans I*) is set forth at App. 24-39.

JURISDICTION

The judgment of the Supreme Court of Virginia was entered on November 30, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Article I, § 10, cl. 1 provides:

> No state shall . . . pass any Bill of Attainder [or] ex post facto Law.

Amendment XIV, § 1 provides:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Virginia Code § 17-110.1 provides:

§ 17-110.1(A) *Review of death sentence*

> A sentence of death . . . shall be reviewed on the record by the Supreme Court.

§ 17-110.1(C)(2)

> In addition to consideration of errors in the trial enumerated by appeal, the court shall consider and determine:
>
> > . . . Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

§ 17-110.1(D)

> In addition to the review and correction of errors in the trial of the case, with respect to review of the sentence of death, the court may:
>
> 1. Affirm the sentence of death; or
>
> 2. Commute the sentence of death to imprisonment for life.

Virginia Code § 19.2-264.3 provides:

§ 19.2-264.3 *Procedure for trial by jury*

> A. In any case in which the offense may be punishable by death which is tried before a jury, the court shall first submit to the jury the issue of guilt or innocence . . . .
>
> C. If the jury finds the defendant guilty of an offense which may be punishable by death, then a separate proceeding before the same jury shall be held as soon as is practicable on the issue of the penalty . . . .
>
> If the sentence of death is subsequently set aside or found invalid, and the defendant or the Commonwealth requests a jury for purposes of resentencing, the court shall impanel a different jury on the issue of penalty.

Virginia Code § 19.2-264.4 provides:

§ 19.2-264.4(D) *Sentence proceeding*

> The verdict of the jury shall be in writing, and in one of the following forms:
>
> "(1) We, the jury, on the issue joined, having found the defendant guilty of (here set out statutory language of the offense charged) and that (after consideration of his prior history that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society) or his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved (torture) (depravity of mind) (aggravated battery to the victim), and having considered the evidence in mitigation of the offense, *unanimously fix his punishment at death.*
>
> Signed ———————————— Foreman"
>
> or
>
> (2) "We, the jury, on the issue joined, having found the defendant guilty of (here set out statutory language of the offense charged) and having considered all of the evidence in aggravation and mitigation of such offense, *fix his punishment at imprisonment for life.*
>
> Signed ———————————— Foreman"

STATEMENT OF THE CASE

Wilbert Evans was convicted of capital murder in April 1981, for the shooting of an Alexandria, Virginia, Deputy Sheriff.[1] He was sentenced to death on June 1, 1981, in the sentencing phase of his bifurcated trial. Evans' sentence of death was affirmed by the Virginia Supreme Court on December 4, 1981. *Evans v. Commonwealth*, 222 Va. 766, 284 S.E.2d 816 (1981), *cert. denied*, 455 U.S. 1058 (1982) (*Evans I*). App. 24a-39a. Several days before his scheduled execution, he filed a Petition for a Writ of Habeas Corpus in state court in which he claimed that Respondent had knowingly presented to the jury inaccurate and seriously misleading evidence concerning Evans' prior criminal record.[2] On April 12, 1983, after delaying for almost one year, the Attorney General for the Commonwealth of Virginia conceded that the sentencing was constitutionally infirm and that Evans' death sentence therefore must be vacated. App. 22a. For that reason, the trial court granted portions of the habeas petition and set aside Evans' death sentence on May 2, 1983. App. 22a-23a.

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[1] The shooting occurred as Evans was being returned to jail after a court appearance and as he struggled with the deputy in an attempt to escape. Evans has always contended that he never intended to kill the deputy, but that the gun fired during the struggle as he attempted to shoot the handcuffs from his wrists. App. 29a.

[2] Evans filed his habeas corpus petition on April 9, 1982 and amended it on May 5, 1982. In the amended petition Evans explicitly stated that certain purported "convictions" used by Respondent to prove Evans' dangerousness had not, in fact, occurred. *See infra* at 7. On July 7, 1982, Evans filed a bill of particulars which discussed in detail the problems with the purported "convictions." On December 29, 1982, Evans filed a second amended petition in which he stated, as well, that most of the convictions Respondent introduced at trial had been obtained without benefit of defense counsel and were therefore inadmissible at the sentencing proceeding. *See* note 21, *infra*.

The timing of the confession of error proved to be critical. During the pendency of Evans' initial appeal from his conviction, the Virginia Supreme Court had ruled that the proper remedy when a death sentence is vacated because of error at the sentencing stage was the imposition of a life sentence. *Patterson v. Commonwealth*, 222 Va. 653, 283 S.E.2d 212 (1981).[3] Although since May 1982 Evans had been requesting his death sentence to be set aside due to use of the purported "convictions," it was not until February 22, 1983, that counsel for Respondent indicated for the first time in an "off-the-record" conversation that Respondent would likely concede error in the case. App. 72a. On that date, the amended death penalty legislation, proposed by Respondent, passed the Virginia Senate on an emergency basis. On March 28, 1983, just two weeks prior to the state's formal concession of error, the Governor had signed into effect as emergency legislation the amendment to the Virginia Code which overruled *Patterson* and allowed for re-sentencings before a new jury where the original sentence of death had been set aside because of errors at the sentencing stage. Virginia Code, § 19.2-264(3)(C), App. 3a.

Thereafter, Respondent gave notice that it would seek the death sentence once again for Evans. Evans objected, claiming that to apply the new law retroactively to him would be a violation of the proscription in the United

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[3] The law in Virginia at that time required the same jury to decide both guilt or innocence and sentencing in capital cases. Virginia Code § 19.2-264.3. In *Patterson* the court reasoned that an improperly selected jury could not be reimpaneled if the death sentence it reached were vacated. Because the state statute permitted the state high court only two options—affirm a death sentence or commute to life—and because error in the jury selection precluded affirmance of the sentence, the only lawful action was to commute the sentence to life. 222 Va. at 660, 283 S.E.2d at 216.

States Constitution against *ex post facto* laws.[4] Evans also claimed that Respondent should be barred from seeking to resentence him because the original sentence of death had been obtained by gross prosecutorial misconduct—the knowing use of false conviction records to obtain the death penalty.[5] Finally, Evans claimed that Respondent had purposely delayed confessing error in his case for almost one year while it sought on an emergency basis, and obtained, the amendments to the death penalty laws described above. This delay deprived him of the right, under the prior law, to a sentence of life.[6]

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[4] U.S. Const. art. I, § 10, cl. 1. The preference against retrospective laws is incorporated in Virginia statutory law as well as in the state constitution. *See* Virginia Code § 1-16 (no new law shall be construed to repeal or affect in any way any right accrued under former law). "Statutes are prospective in the absence of an express provision by the legislature." *Washington v. Commonwealth*, 216 Va. 185, 217 S.E.2d 815 (1975). "A contrary rule might encourage dilatory tactics and procrastination which would hamper the judicial process." *Ruplenas v. Commonwealth*, 221 Va. 972, 978, 275 S.E. 2d 628 (1981). The amended death penalty statute at issue in the present case contains no reference to retroactivity. *See* Virginia Code § 19.2-264.3.

[5] A hearing on these claims revealed that, contrary to the assertions by the Attorney General that no counsel for Respondent knew of the false records prior to trial, in fact the prosecutor at Evans' original trial *had known* at that time that the purported convictions he used against Evans were invalid. App. 9a.

[6] The decision to confess error was made known to Evans' counsel on the very day the new law was signed into effect. App. 73a. The Assistant Attorney General who was handling Evans' habeas petition, and who made the decision to confess error, was the same Assistant who had responsibility in the Attorney General's office of accomplishing the task of securing on an emergency basis legislative enactment of the amendments to the death penalty laws. Respondent claims it was a mere coincidence that the confession of error, almost two years after the knowing misuse of the purported "convictions" and almost one year after Evans first challenged Respondent about its misconduct, was made only two weeks after the law changed. *See* App. 10a.

The prosecutor admitted that at least one month prior to the trial, he learned that one of the purported convictions had been appealed and *nolle prossed* at a trial *de novo*.[7] Nevertheless, he introduced the abstract of the lower court conviction at the sentencing phase of the trial. Another purported conviction was one which had likewise been appealed *de novo*, resulting in a reconviction. Both abstracts were introduced in a manner clearly designed to lead the jury to believe that in fact there had been two separate crimes. The prosecutor also admitted that despite his knowledge of these flaws, he did not tell the defense attorneys anything about the errors in the records until after Evans had been found guilty and until after the evidence had been presented at his sentencing.[8]

Events prior to the hearing supported the conclusion that the prosecutor had not disclosed the facts. Still represented by his trial counsel, Evans took an automatic appeal of his conviction to the Virginia Supreme Court. By the terms of Virginia Code § 17-110.1(C), the court had an independent duty to review the sentence of death and to weigh its appropriateness. In urging the court to uphold the death sentence, Respondent listed and again

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[7] App. 50a. North Carolina, the site of the charge at issue, employs a two-tier system for the trial of misdemeanors, the second tier consisting of a trial *de novo*. The defendant, if convicted at the first tier, has an appeal of right to the superior court, and "in contemplation of law it is as if the case had been brought there originally and there had been no previous trial. The judgment appealed from is completely annulled and is not thereafter available for any purpose." *State v. Bryant*, 181 S.E.2d 211, 212 (N.C. 1971).

[8] App. 52a. The prosecutor gave inherently incredible testimony that he believed it was a matter of defense strategy to permit Respondent to introduce the nonexistent "convictions." App. 57a. Defense counsel vehemently denied ever being told about the errors in the conviction records and insisted that had they known, they never would have allowed the records to be presented to the jury. App. 64a-65a, 67a, 69a.

relied on all of the invalid "convictions" offered into evidence at trial. App. 41a-42a. The same recitation was later included in Respondent's brief in opposition to Petitioner's earlier Petition For A Writ Of Certiorari to the United States Supreme Court. App. 45a-46a. Certiorari was denied. 455 U.S. 1038 (1982). The Virginia Supreme Court upheld the sentence of death, placing specific reliance upon several of the nonexistent "convictions."[9]

At the hearing on resentencing, there was little dispute by Respondent that had the Virginia Supreme Court been told at the time it considered Evans' appeal that the records the jury had received were false, it would have set aside his death sentence and replaced it with a sentence of life, just as it had done in the *Patterson* case, decided just six weeks prior to *Evans I*. Nevertheless, the trial court, over Evans' objection, ruled that resentencing could proceed before a new jury. App. 19a-20a. The new jury was not presented with live testimony concerning the circumstances of the crime. Instead, it was read portions of the transcript of the guilt-or-innocence phase of Evans' original trial, and was presented with other, live, sentencing evidence. Once again, a sentence of death was imposed, based solely upon the jury's determination of Evans' future dangerousness.[10]

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[9] *See* App. 31a (alluding to the assault that was *nolle prossed.*) One of Evans' counsel testified at the hearing on resentencing that had he known of the false records, he would have made a specific objection before the trial court and would have protested Respondent's reliance on the false evidence on appeal. App. 67a.

[10] Five months later Evans was involved in an event that cast severe doubt on the jury's conclusion. In May 1984, six death row inmates escaped from Mecklenberg Correctional Center (where Evans was incarcerated), after holding fourteen prison guards hostage. Despite extreme pressure to join the escape, or simply to yield to events, Evans prevented violence and helped those who had been taken hostage. Though unarmed, he placed himself between the heavily armed escapees and the hostages, intervening on the hostages' behalf, urging the escapees to remain calm and nonviolent,

Evans appealed to the Supreme Court of Virginia. *Evans v. Commonwealth*, No. 840474, slip op. (Va. November 30, 1984). App. 1a-15a. The court referred to the "indifferent, careless manner" with which the prosecutor introduced Evans' prior "convictions" and that the prosecutor "admitted he knew, at the time the conviction records were proferred during the trial, that three of the purported convictions actually were only one." App. 8a-9a. The court concluded that "if the prosecutor knew they were inaccurate in any particular," which the court found was so, "the documents should not have been offered in evidence." App. 9a. Nevertheless, because Evans had been given a new sentencing hearing, the court ruled that the harm had been cured, and his death sentence was affirmed.

REASONS FOR GRANTING THE WRIT

I. THE VIRGINIA SUPREME COURT MISAPPLIED *DOBBERT v. FLORIDA* AND IGNORED OTHER PRECEDENT IN REJECTING PETITIONER'S *EX POST FACTO* CLAIMS.

In upholding petitioner's sentence of death, the Virginia Supreme Court took bits and pieces from *Dobbert v. Florida*, 432 U.S. 282 (1977), and *Weaver v. Graham*, 450 U.S. 24 (1981), applied them incorrectly, and reached a result not warranted by either case. As other states struggle in the coming years with their re-drafted death penalty statutes, particularly with the effects of retroactivity and the *ex post facto* clause, they will need authoritative word from this Court to avoid the plainly incorrect result reached below.

Under the law as it existed at the time Evans committed his offense, at the time he was tried, at the time his conviction was affirmed (*Evans I*), and at the time Respondent first indicated it would concede the invalidity

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and helping the hostages when he could. The fourteen hostages credit Evans with saving their lives, and one female hostage credits him with preventing her rape. App. 75a-80a.

of his death sentence one and a half years later, Evans was entitled, upon the setting aside of his death sentence, to a sentence of life. That action was mandated by Virginia Code § 19.2-264.3, and by *Patterson v. Commonwealth*,[11] decided just six weeks before *Evans I*.[12]

Manifestly, had the errors which led Respondent to concede the invalidity of Evans' sentence in 1983 been brought to the attention of the Virginia Supreme Court when it first considered his appeal, the court would have done precisely what it had done in *Patterson* just six weeks before and commuted his sentence to life. Instead, because Respondent presented to the Virginia Supreme Court, as well as to this Court, evidence which Respondent knew to be false, the errors did not come to light. Now, because Respondent was able to cause the legislature, on an emergency basis, to amend § 19.2-264.3, Evans again awaits an execution approved by the Virginia Supreme Court.

This result stands in stark contrast to that reached in *Dobbert v. Florida*,[13] upon which the Virginia Supreme Court placed so much reliance. In fact, petitioner has found no case that supports the result reached by the court below in which the statutory sentencing scheme in

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[11] 222 Va. 653, 283 S.E.2d 212 (1981).

[12] Before the amendment on March 28, 1983, Virginia Code § 19.2-264.3, "Procedure for Trial by Jury," stated, in pertinent part:

> "C. If the jury finds the defendant guilty of an offense which may be punishable by death, then a separate proceeding before the same jury shall be held as soon as is practicable on the issue of the penalty, which shall be fixed as is provided in § 19.2-264.4.

In *Patterson*, the Virginia Supreme Court read this provision to require that where a sentence of death was vacated due to error at the sentencing stage such as to preclude the same jury from rehearing the case, the defendant was to automatically receive a sentence of life. 222 Va. at 660, 283 S.E.2d at 216.

[13] 432 U.S. 282 (1977).

place at the time of trial was replaced by a more severe scheme almost two years later, and then applied retroactively.

In *Dobbert*, this Court found the change in the Florida law was not an *ex post facto* change, but "procedural, and on the whole ameliorative." 432 U.S. at 292. The change was deemed to be procedural since "there was no change in the quantum of punishment attached to the crime." 432 U.S. at 294. It was deemed to be ameliorative because it provided new protections to the accused at the sentencing stage. 432 U.S. at 294-97.

In contrast, here the change effected by the 1983 emergency amendment to Virginia's death penalty statute was neither procedural nor ameliorative, but a decided abandonment of the principles embodied in the *ex post facto* clause. First, this was no mere procedural change, even though it was paraded in procedural garb.[14] Rather, the change worked by the amendment deprived Evans of the substantial right which existed prior thereto to have the same jury which heard the facts of his trial decide his fate.

This explicit right, embodied in Virginia Code § 19.2-264.3, was a recognition that citizens who were asked to decide if a defendant should live or die must be intimately familiar with the facts of the offense. It was a reflection of the notions underlying cases such as *Gregg v. Georgia*, 428 U.S. 153 (1976), *Woodson v. North Carolina*, 428 U.S. 280 (1976), and *Lockett v. Ohio*, 438 U.S. 586

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[14] *See Weaver v. Graham*, 450 U.S. 24, 29 n.1 (1981) ("Alteration of a substantial right is not merely procedural even if the statute takes a seemingly procedural form."). Truly procedural changes are, for example, laws which provide for separate trials for co-defendants, *Beazell v. Ohio*, 269 U.S. 167 (1925); laws enlarging the class of people who can testify, *Hopt v. Utah*, 110 U.S. 576 (1884); laws changing the place of trial, *Gut v. State*, 76 U.S. 35 (1870); laws abolishing courts and creating new ones, *Duncan v. Missouri*, 152 U.S. 377 (1894); and laws changing the qualifications of grand jurors, *Gibson v. Mississippi*, 162 U.S. 565 (1896).

(1978), that "an individualized decision is essential in capital cases" [15] and that the sentencing jury must be presented with all relevant sentencing information. It was also a departure from the prior practice in Virginia in which sentencing juries were not necessarily those which heard the guilt stage.[16] The jury that heard Evans' trial had the opportunity to hear, firsthand, the inmates who testified that Evans had planned the escape the night before. The attack on their credibility was pivotal for the defense. In contrast, the jurors who sentenced Evans to death heard only the transcript of that testimony. They had no basis to weigh the words, or to judge credibility in this crucial area by viewing the demeanor of the witnesses on the stand.

Of course, this right was a statutory right, and the legislature that enacted it certainly had the power to repeal it. But since the law requiring the same jury to decide guilt-or-innocence and whether to mete out the death penalty was in place at all pertinent times during Evans' prosecution, he was entitled to its benefit. The amended law, coming into effect after his trial and sentencing, should not have been held applicable. In *Dobbert*, by contrast, "the new statute was in effect at the time of [Dobbert's] trial and sentence", which this Court considered dispositive. 432 U.S. at 301.

Secondly, the amended law can scarcely be called "ameliorative." The Virginia Supreme Court misread *Dobbert* in so concluding. Dobbert was given a panoply of new rights by the amended statute, including independent reviews by both the trial judge and the appeals court. The fact that the jury there recommended a life sentence which would have been mandatory under the old law, but

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[15] *Lockett v. Ohio*, 438 U.S. at 605.

[16] *See, e.g., Fogg v. Commonwealth*, 215 Va. 164, 207 S.E.2d 847 (1974); *Huggins v. Commonwealth*, 213 Va. 327, 191 S.E.2d 734 (1972); *Snider v. Cox*, 212 Va. 13, 181 S.E.2d 617 (1971).

which was rejected by the judge under the new law, was not controlling since "it cannot be said with assurance that, had his trial been conducted under the old statute, the jury would have returned a verdict of life." 432 U.S. at 294. In stark contrast, it can be said with *absolute* assurance that had Respondent disclosed to the Virginia Supreme Court the errors in Evans' case, Evans would have received a life sentence under the old statute.

The court below thus fashioned a way to save Evans' death sentence which contravenes the notions of fairness embodied in the *ex post facto* clause and its ban on "arbitrary and potentially vindictive legislation." *Weaver v. Graham*, 450 U.S. 24, 29 (1981).[17]

The Virginia Supreme Court's analysis was faulty in another respect as well. In reaching its result, the court below seemed to rest on language in *Weaver* that "[c]ritical to relief under the *Ex Post Facto* Clause is not an individual's right to less punishment, but the lack of fair notice and government restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated. *Weaver v. Graham*, 450 U.S. 24, at 30 (1981)." App. 5a. Because Evans was on notice at the time of his crime that Virginia would seek the death penalty for the shooting of a law enforcement officer, the court reasoned that there was no *ex post facto* violation.

But that statement in *Weaver* was never intended to end the inquiry. It was the law of Virginia as enunciated

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[17] Indeed, the mere circumstance that Respondent prosecuted Evans, wanted to preserve the death sentence, delayed for almost one year in confessing error, and actively worked for passage of a statute on an emergency basis that affected Evans differently from anyone else (Evans was the only inmate on death row whose death sentence was set aside by virtue of Respondent's confession of error) suggests that the 1983 amendment should be considered a bill of attainder. U.S. Const. art. I, § 10, cl. 1. *Cf. United States v. Lovett*, 328 U.S. 303, 315 (1946).

later in *Patterson* that if his sentence of death was set aside, he was entitled to a sentence of life. The Virginia court's apparent formulation of the *ex post facto* inquiry completely ignored cases such as *Lindsey v. Washington*, 301 U.S. 397 (1937). There, the Court struck down as *ex post facto* a law which changed the sentence allowable for the crime of grand larceny from a maximum of 15 years to a mandatory 15 years. The Court noted that:

> "It is true that petitioners might have been sentenced to fifteen years under the old statute. But the *ex post facto* clause looks to the standard of punishment prescribed by a statute, rather than to the sentence actually imposed. . . . Removal of the possibility of a sentence of less than fifteen years, at the end of which the petitioners would be freed from further confinement and the tutelage of a parole revocation at will, operates to their detriment in the sense that the standard of punishment adopted by the new statute is more onerous than that of the old."

301 U.S. at 401. By focusing solely on the maximum sentence for a capital offense, the Virginia court failed to recognize that a fundamental component of Evans' *ex post facto* claim was that he would automatically receive a life sentence under certain circumstances. This Court should hear this case to ensure that state and federal courts do not improperly use a characterization of a statute as procedural or ameliorative to foreclose "analysis or comparison of the practical operation of the two statutes," [18] which may indeed change substantive rights or increase potential punishment.

In the 14 years since *Furman v. Georgia*, 408 U.S. 328 (1972), the Court has written numerous opinions giving definition and dimension to the constitutional requirements governing the trial of death cases. Along the way, many death penalty statutes have been abandoned or amended. With each new decision, various states again

[18] 301 U.S. at 399-400.

undertake the process of enacting new death penalty statutes, or amending old ones, in an attempt to conform to evolving constitutional standards enunciated by the Court.

One of the serious problems that arises for each state undertaking to revamp its death penalty statute is the effect of each change on defendants whose cases have not yet reached final judgment as of the effective date of the new law. Problems also arise in those cases, such as the present one, where final judgment was entered long ago. This is apt to be a recurring problem as inmates whose death sentences were imposed several years ago are successful in collateral attacks on their convictions or sentences, and the states struggle with fashioning the proper remedy.

For example, the Florida and Pennsylvania Supreme Courts have held that a defendant who was convicted under a statute later declared to be unconstitutional may not be resentenced to death under a newly enacted death penalty statute, when, while his case was on appeal, all other defendants sentenced under the valid law were given sentences of life. *Lee v. State*, 340 S.2d 474 (Fla. 1976); *Commonwealth v. Story*, 440 A.2d 488 (Pa. 1981). The Virginia Supreme Court, on the other hand, has concluded that retrial under the new statute is appropriate.

The potential for attempts at new trials or sentencing proceedings under newly enacted death penalty provisions and the potential that defendants will be facing laws different than those in effect at the time of their crimes or their trials is great. There is, therefore, a substantial need for a clear statement from the Court concerning the reach of the *ex post facto* clause in such situations, where categorizing a law as procedural, or as substantive, will mean the difference between life and death.

II. SENTENCING PETITIONER TO DEATH WHEN, BUT FOR RESPONDENT'S CONSCIOUS DELAY IN CONFESSING ITS ERROR, PETITIONER WOULD HAVE RECEIVED THE LIFE SENTENCE THAT SIMILARLY SITUATED DEFENDANTS RECEIVED, VIOLATED THE EQUAL PROTECTION CLAUSE.

Evans was tried in April 1981 and sentenced to death on June 1, 1981. Evans appealed his conviction to the Virginia Supreme Court, which affirmed on December 4, 1981. Between his sentencing and the disposition of his appeal, a critical event occurred: On October 16, 1981, the Virginia Supreme Court held that vacating a defendant's death penalty (though affirming the conviction) necessitated reducing the sentence to life imprisonment.[19] Evans' death sentence ultimately was withdrawn when Respondent, after long, unwarranted delay, conceded that it had improperly used false records of convictions [20] and uncounseled convictions [21] at the sentencing phase of Evans' trial. Had Respondent confessed error immediately, rather than perpetuating it in its opposition to Evans' brief on appeal and to Evans' initial petition for a writ of certiorari, Evans and Patterson and any other defendant whose death penalty was vacated

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[19] In *Patterson v. Commonwealth*, 222 Va. 653, 657, 283 S.E.2d 212 (1981), the Virginia Supreme Court held that where a death sentence is vacated, though the conviction affirmed, the defendant must automatically receive life imprisonment. The court reasoned that under the law requiring the same jury to hear the merits and the sentencing phases of the trial, taint at the sentencing phase precluded re-impaneling the same jury. An automatic life sentence was thus the only lawful result. 222 Va. at 660, 283 S.E.2d at 216.

[20] It is, of course, beyond argument that the use of false or perjured evidence cannot support a criminal conviction. *Miller v. Pate*, 386 U.S. 1, 7 (1967).

[21] Prior convictions at which the defendant did not have counsel may not be used to enhance a defendant's sentence. *Burgett v. Illinois*, 466 U.S. 222 (1980); *Baldasar v. Texas*, 389 U.S. 109 (1967).

would have received equal treatment. They would have automatically received life sentences. The happenstance of timing and, indeed, Respondent's refusal to confess its undisputed error promptly, while Respondent actively sought to overrule *Patterson* legislatively on an emergency basis, should not be a basis for having one human die while another lives.

This Court has endorsed the view that in death penalty cases, state high courts should review each death sentence "to ensure that similar results are reached in similar cases." [22] In the present case, strikingly similar cases produced drastically different results. In *Patterson*, the accused was convicted of murder and received a death sentence. When the sentence (but not the conviction) was vacated, the Virginia Supreme Court held that the only permissible sentence under the circumstances was life imprisonment.[23] In the present case, which moved through the Virginia criminal courts virtually in tandem with *Patterson*, Evans was convicted and received a death sentence. His death sentence was flawed, however, by the prosecution's knowing introduction of improper convictions to prove Evans' dangerousness.[24] Had Respondent confessed its impropriety promptly to the Virginia Supreme Court in the course of Evans' appeal—in fact, Respondent exacerbated the error by emphasizing the

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[22] *Proffitt v. Florida*, 428 U.S. 242, 258 (1976), citing *State v. Dixon*, 283 So.2d 1, 10 (1973). *See* U.S. Const. amend. XIV, § 1. Virginia Code § 17-110.1(C)(2) directs the Virginia Supreme Court to determine "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases. . . ."

[23] *See* note 3, *supra*.

[24] Strikingly, less than one year after the jury concluded that Evans posed a danger to the community, he interceded during an escape of six inmates from Mecklenberg Correctional Center's death row and was credited with saving the lives of fourteen prison guard hostages. App. 75a-80a.

purported "convictions" as a basis for affirming the conviction (App. 41a-42a)—the Virginia Supreme Court would have indisputably vacated the sentence. Pursuant to *Patterson*, Evans would have automatically been resentenced to life imprisonment.[25]

In *Dobbert v. Florida*, 432 U.S. 282, this Court held that equal protection would not be denied in death penalty cases if a new law, in effect at the time of an accused's trial and sentence, were applied. The Virginia Supreme Court in the present case did not apply the law in effect at the time of Evans' trial but rather applied a law passed two years after his trial. The Virginia Supreme Court had previously acted to reduce from death to life imprisonment the sentence of a man who was tried and convicted, like Evans, two years before the new law was enacted. The consequence of the Virginia court's action was to misapply *Dobbert* and deny equal protection to Evans. This Court should not abide such a result.

Evans' death sentence turned on one fact: the refusal of Respondent to concede error until *Patterson* was overruled legislatively. Had Respondent conceded error immediately after knowingly using the purported "convictions" at the sentencing phase of Evans' trial, and certainly as soon as Evans' counsel had raised the issue of Respondent's knowing error in his state habeas corpus petition, Evans and Patterson would have been in the identical situation: tried and convicted and sentenced to death only to have their convictions reduced to life upon invalidation of their sentencing proceedings. Whatever rationality can be ascribed to Florida's system of line-drawing in *Dobbert*, it is irrational to draw a line be-

[25] In view of *Patterson*, automatic commutation in such situations became a part of Virginia's law just as surely as if it had been drafted by the legislature. *See Paulos v. New Hampshire*, 345 U.S. 395, 402 (1953); *Winters v. New York*, 333 U.S. 507, 514 (1948).

tween one defendant (Patterson), whose death sentence was reduced to life because the error in his sentencing proceeding was susceptible of recognition by the state high court, and another defendant (Evans), who received death because Respondent misled the state high court in connection with the defendant's sentencing proceeding.[26] Both classes of cases, in the words of *Dobbert*, had progressed "sufficiently far in the legal process to be governed solely by the old statute. . . ." 432 U.S. at 301. "[R]ather than permitting the present death penalty, *Dobbert* forbids it."[27]

Whether one inmate lives and another is put to death by the state should not rest on mere matters of timing or procedure. In *Lee v. State*, 340 So.2d 474 (Fla. 1976), a defendant was convicted of murder and sentenced to death. When the death penalty statute under which he was convicted was ruled unconstitutional, his sentence was reduced to life pursuant to his motion, an order that was appealed by the state. Meanwhile, the death sentences of all other death row inmates were reduced.[28] Pending the disposition of the appeal, the state legislature passed a death penalty statute that passed constitutional muster. Applying the new statute, the state appeals court reversed the order reducing the defendant's sentence and held that the new sentencing statute should apply. He received a death sentence again. The state supreme court, invoking the constitutional mandate

[26] *See Commonwealth v. Story*, 440 A.2d 488, 491-92 (Pa. 1981) (defendant tried, convicted, and sentenced in 1975 pursuant to death penalty statute declared unconstitutional while appeal pending; death penalty set aside but defendant reprosecuted under 1978 death penalty statute; held that new law not applicable so death penalty forbidden).

[27] *Commonwealth v. Story*, 440 A.2d at 492.

[28] Apparently all other death row inmates in Florida obtained reductions of their sentences in light of *Furman v. Georgia*, 408 U.S. 238 (1972). *See Lee v. State*, 340 So.2d at 475.

of equal protection, held that the sentence had to be reduced to life.[29] Had the defendant's attorney not initiated a motion to reduce his original death sentence, the court reasoned, his sentence would have been reduced to life along with all other death row inmates. Because the question of whether a person should live or die should not hinge on when he requested a reduction in his sentence, the sentence was reduced to life.[30]

The identical reasoning should apply here. Should the question of whether a person should live or be put to death by the state be determined by a combination of Respondent's first misleading the highest state court and then refusing for almost one year to admit its error? Had the Virginia Supreme Court been alerted to the flaws in Evans' sentencing proceeding, there is no doubt that his sentence would have been vacated and reduced to life. In these circumstances, it would deny Evans equal protection to subject him to the death penalty while Patterson, his equivalent in all significant respects,[31] is permitted to live. Because state courts are apparently apt to seize on inconsequential distinctions between defendants in death penalty cases, this Court should reiterate its position that, particularly when the state contemplates meting out the death penalty, similarly situated defendants must be treated equally.

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[29] 340 So. 2d at 475.

[30] *Id. See also Commonwealth v. Crenshaw*, 470 A.2d 451, 454-55 (Pa. 1983) (but for extraordinary delay of almost three years in bringing defendant to trial, trial would have been held prior to enactment of new death penalty statute; death sentence vacated).

[31] The Virginia Supreme Court considered Patterson distinguishable because his sentence was reduced before the effective date of the new law; Evans' sentence was set aside afterward. App. 13a. Our research has found no case in which such a distinction was considered dispositive of the cut-off between applying an old law or a new one.

III. THE TRIAL COURT'S INSTRUCTION TO THE JURY IN THE RESENTENCING PROCEEDING THAT THE SENTENCE OF LIFE IMPRISONMENT REQUIRED A UNANIMOUS VOTE OF THE JURY WAS CONTRARY TO THE STATUTES OF VIRGINIA AND VIOLATED PETITIONER'S DUE PROCESS RIGHTS.

The statute relating to the unanimity of the jury in death penalty cases, provides as follows:

> "D. The verdict of the jury shall be in writing, and in one of the following forms:
>
> "(1) We, the jury, on the issue joined, having found the defendant guilty of (here set out statutory language of the offense charged) and that (after consideration of his prior history that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society) or his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved (torture) (depravity of mind) (aggravated battery to the victim), and having considered the evidence in mitigation of the offense, *unanimously fix his punishment at death.*
>
> Signed _____ Foreman"
>
> or
>
> (2) "We, the jury, on the issue joined, having found the defendant guilty of (here set out statutory language of the offense charged) and having considered all of the evidence in aggravation and mitigation of such offense, *fix his punishment at imprisonment for life.*
>
> Signed _____ Foreman"

§ 19.2-264.4(D) of the Code of Virginia, 1950, as amended (emphasis added).

The difference between the death penalty verdict form and the life imprisonment verdict form is patently clear.

For the jury to sentence a defendant to death requires a unanimous verdict. The word "unanimously" is conspicuously absent from the verdict form to be used should the jury not decide on the death sentence.

The legislative intent was clearly to omit the word "unanimously" in the life imprisonment verdict form. The maximum *expressio unius est exclusio alterius* has application here. Thus, where the word "unanimously" was used expressly in the death verdict form, its exclusion in the life imprisonment verdict form should be construed as an express omission by the legislature.

Under the law in Virginia, if the jury had been properly instructed, a lone juror who firmly believed life imprisonment rather than death was appropriate would understand that his refusal to vote for death would result in a life sentence. Under the errant instruction below, however, the holdout juror might believe that he would never be able to convince the other eleven jurors that they should vote for life rather than death. Therefore, he might vote for a death penalty out of the view that the law required unanimity one way or the other. This Court must make clear to state courts that, unless state statutes so specify, trial judges must not instruct jurors that they need to vote unanimously for a life sentence in a death penalty case.

CONCLUSION

For the reasons stated above, certiorari should be granted to review the judgment of the Supreme Court of Virginia.

Respectfully submitted,

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January 29, 1985

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[82] Counsel wish to express their appreciation for the assistance of law student James Sotille in the preparation of this petition.

84-1224

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WILBERT LEE EVANS,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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FROM THE CIRCUIT COURT
OF THE CITY OF ALEXANDRIA

Wiley R. Wright, Jr., Judge

PRESENT: All the Justices

Record No. 840474

WILBERT LEE EVANS

v.

COMMONWEALTH OF VIRGINIA

OPINION BY JUSTICE A. CHRISTIAN COMPTON

November 30, 1984

This is the automatic, priority review of a sentence to death. Previously, upon similar review, we affirmed an earlier death sentence imposed on the defendant for the same crime. Subsequent to the affirmance, the defendant instituted a state habeas corpus proceeding. As the result of information developed in the habeas case, the Commonwealth confessed error and the first death sentence was set aside. Following a resentencing proceeding, the present death sentence was imposed. The principal issue in this appeal is whether defendant's sentence should be vacated because of the alleged violation of the *ex post facto* clauses of the state and federal constitutions.

The chronology sets the stage. On January 27, 1981, Wilbert Lee Evans, a prisoner, fatally shot a deputy

sheriff who was escorting him to jail in Alexandria. About four months later, a jury convicted defendant of capital murder in the willful, deliberate, and premeditated killing of a law-enforcement officer for the purpose of interfering with the performance of the officer's official duties. Code § 18.2-31(f). In the sentencing phase of the bifurcated trial, the same jury recommended the death penalty, based solely upon a finding of "future dangerousness." The Commonwealth relied mainly on records of seven purported out-of-state convictions of defendant. The jury determined that after consideration of Evans' prior history, there was a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society. *See* Code § 19.2-264.4(C). On June 1, 1981, the trial court sentenced defendant to death.

On October 16, 1981, in the case of *Patterson* v. *Commonwealth*, 222 Va. 653, 283 S.E.2d 212 (1981), we commuted a defendant's death sentence to imprisonment for life. There, we held that the lower court had failed, in the penalty phase of that bifurcated trial, to preserve fully the defendant's right to a fair and impartial jury. There was no error in the guilt phase of the trial but the sentence to death was invalidated. We further decided that the statutory framework existing at the time inhibited a remand of the case for a new trial limited to the penalty issue only. This was because Code § 19.2-264.3(C) provided at the time that if a defendant was found guilty by a jury of a capital offense, the *same* jury must fix the punishment. We said: "Manifestly, the same jury that convicted Patterson should not now be reconvened upon a remand." 222 Va. at 660, 283 S.E.2d at 216.

On December 4, 1981, we affirmed Evans' conviction and sentence to death. *Evans* v. *Commonwealth*, 222 Va. 766, 284 S.E.2d 816 (1981). About four months later, the Supreme Court of the United States denied defendant's petition for a writ of certiorari 455 U.S. 1038 (1982).

Within a month, in April of 1982, defendant filed a petition for a writ of habeas corpus in the trial court. In May and December of 1982, defendant filed amendments to the habeas corpus petition to reflect new claims. In the May amendment, the defendant alleged that at least two of the seven purported North Carolina convictions relied on by the prosecutor during the penalty phase of defendant's trial actually were not convictions at all. The defendant alleged that one charge, assault on a police officer with a deadly weapon, had been dismissed after an appeal. He asserted that another charge, engaging in an affray with a knife, also had been appealed. In a trial *de novo* on that charge, defendant was again convicted, but the record used in his capital murder trial listed both convictions for use of the knife and no attempt was made to explain this duplication to the jury.

Effective March 28, 1983, emergency legislation adopted by the General Assembly was approved amending the relevant death penalty statutes because of the *Patterson* decision. Code § 19.2-264.3 was amended to provide that "[i]f the sentence of death is subsequently set aside or found invalid, and the defendant or the Commonwealth requests a jury for purposes of resentencing, the court shall impanel a different jury on the issue of penalty." Acts 1983, ch. 519.

About two weeks later, an Assistant Attorney General of Virginia wrote a letter to the trial judge confessing error in the defendant's sentencing proceeding and acknowledging that Evans' death sentence should be vacated. The April 12, 1983 letter indicated that "unbeknownst to the prosecution or defense counsel at the trial" many of the records of convictions were "seriously misleading" or "otherwise defective." It had been discovered that not only were three purported convictions

actually one but several of the other convictions were obtained when Evans apparently had appeared without counsel. On May 2, 1983, the trial court entered an order setting aside defendant's death sentence and granting a hearing to determine whether defendant should be resentenced or his sentence reduced to life imprisonment.

On September 21, 1983, an evidentiary hearing was held and, by order entered October 12, 1983, the trial court denied defendant's motion to bar the Commonwealth from again seeking the death penalty. On January 30, 1984, the trial court impanelled a new jury for a resentencing hearing, in accordance with amended Code § 19.2-264.3. At the conclusion of the hearing, the jury fixed punishment at death. On March 7, 1984, the trial court entered the order appealed from imposing the death penalty.

We shall address the issues in the order presented by the defendant. They involve the *ex post facto* violation, two claims of prosecutorial misconduct, double jeopardy, misdirection of the sentencing jury, and denial of equal protection. The relief sought by the defendant is either a reversal of the trial court's decision which allowed resentencing and replacement of the sentence of death with a sentence of life imprisonment, or, commutation of his sentence to life imprisonment, or, remand of the case to the trial court for a new sentencing hearing.

Defendant contends that application of the revised sentencing law to him violates the prohibition against *ex post facto* laws. According to Evans, the *Patterson* decision made clear, until Virginia's death penalty statutes were amended by emergency legislation on March 28, 1983, that this Court had but two options in reviewing a sentence of death. The Court could affirm the sentence to death or commute the sentence to life imprisonment. A remand for resentencing in the case where the original jury was "tainted" was not possible, the defend-

ant argues. Accordingly, Evans says, under the law as it existed at the time he committed his offense, at the time he was tried, at the time his first conviction was affirmed, and at all times before approval of the emergency legislation, he was entitled to a sentence of life imprisonment upon the setting aside of his death sentence. He argues that as the result of *Patterson*: "Automatic commutation in such situations thus became a part of Virginia's law just as surely as if it had been drafted by the legislature."

Evans contends that had the errors which led to the Commonwealth's confession of error been brought to our attention at the time of his first appeal, we would have done precisely in *Evans* what we had done seven weeks previously in *Patterson*, and Evans would have received a life sentence. He contends the considerations which led the Court to commute Patterson's sentence, that is, the impropriety of recalling Patterson's improperly selected jury, applied with full force to Evans' case. His jury had been irreparably "tainted" by exposure to at least five invalid convictions, he says. Defendant concludes that it was error of constitutional dimension to try him under a revised sentencing scheme which was not in effect until more than a year after his conviction was final, "and which replaced his statutory right to a life sentence with the renewed prospect of death." We reject defendant's contentions and conclude that there has been no *ex post facto* violation.

Whether a defendant has a "right," or is "entitled," to a life sentence if his death sentence is set aside is irrelevant in an *ex post facto* analysis. "Critical to relief under the *Ex Post Facto* Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated." *Weaver* v. *Graham*, 450 U.S. 24, 30 (1981). Pertinent to the *ex post facto* inquiry is whether

the defendant had "fair warning as to the degree of culpability which the State ascribed to the act of murder." *Dobbert* v. *Florida*, 432 U.S. 282, 297 (1977); *Smith* v. *Commonwealth*, 219 Va. 455, 475, 248 S.E.2d 135, 147 (1978), *cert. denied*, 441 U.S. 967 (1979). Manifestly, Evans had "fair notice" and "fair warning" at the time of his 1981 offense that the capital murder of a law-enforcement officer was a crime for which the death penalty could be imposed. Code §§ 18.2-31(f) and 18.2-10(a). Virginia's view of the severity of capital murder and of the degree of punishment which the General Assembly wished to impose upon capital murderers had been clearly announced before Evans' criminal conduct occurred.

Defendant argues in rebuttal, however, a full "fair warning" inquiry must take into account that Evans was also deemed to understand that if he were to receive a death sentence and if his death sentence were to be set aside, his punishment would be life imprisonment. Defendant notes the following statement in *Weaver*: "Thus, even if a statute merely alters penal provisions . . . it violates the Clause if it is both retrospective and more onerous than the law in effect on the date of the offense." 450 U.S. 30-31 (footnote omitted). He contends it was improper to impose a more onerous sentencing procedure upon him than was in place at the time of his crime.

There are at least two answers to this contention. First, according to *Dobbert*, the *ex post facto* inquiry focuses on "the quantum of punishment attached to the crime," 432 U.S. at 294, of which the defendant had notice at the time of the offense, and not on adjustments in the method of administering that punishment that are collateral to the penalty itself. Second, the statutory amendment was not "more onerous" than the prior law; it was "ameliorative" and hence not *ex post facto*. 432 U.S. at 294; *Smith* v. *Commonwealth*, 219 Va. at 475, 248 S.E.2d at 147. As the Attorney General points out,

"[t]he change insures that an accused, who has been fairly tried and convicted of capital murder, also receives a fair and impartial trial on the issue of punishment." Where, as here, there has been a judicial determination that a sentence to death is invalid because of error during the penalty stage, the new law provides for impanelling a new jury, free of any taint arising from errors during the first trial, to redetermine the defendant's punishment. A defendant convicted of capital murder is entitled to a fair and impartial determination of his punishment; he will not be heard to complain that a change in the law which protects that right is not wholly beneficial to him.

Kring v. *Missouri*, 107 U.S. 221 (1882), heavily relied on by defendant, is not controlling. There, at the time of the offense, an accused convicted in Missouri of second-degree murder was thereby acquitted of first-degree murder. Prior to Kring's trial, the Missouri Constitution was amended to provide that an accused could be retried for first-degree murder, notwithstanding his earlier conviction and sentence for murder in the second degree. Kring pled guilty to second-degree murder. On appeal, the conviction was reversed because of a breached plea agreement. Upon retrial, Kring was convicted of first-degree murder. The second conviction was reversed by the Supreme Court because the change in law operated *ex post facto*. The Court held that the new constitutional provisions eliminated what was, by the law of the state when the crime was committed, an absolute defense to the charge of first-degree murder. 107 U.S. at 229. Unlike the present case, the new law in *Kring* abrogated a substantial right which existed at the time of the offense. In contrast, Evans has been deprived of no substantial right.

Next, defendant contends the Commonwealth's Attorney knowingly used false evidence to obtain the original sentence to death and that such conduct so violated fun-

damental fairness and due process as to bar a subsequent sentencing proceeding. This claim focuses on the flawed record of defendant's prior convictions.

The trial judge conducted a full investigation into this charge at the hearing on September 21, 1983. At the conclusion of the hearing, the court found from the evidence "that the defendant has failed to prove to the satisfaction of the Court that the prosecution engaged in such misconduct or tactics as to warrant the Court in concluding that the Commonwealth is precluded from again seeking the death penalty in this case." Although our review of the record convinces us that credible evidence supports the trial court's finding of fact, we will agree with defendant and assume, without deciding, that the Commonwealth's Attorney's handling of this particular phase of the original trial involved serious prosecutorial misconduct. Nevertheless, the defendant is not entitled to the relief he seeks.

In *United States* v. *Morrison*, 449 U.S. 361 (1981), the Supreme Court unanimously held that governmental action which involved "deliberate" and "egregious" conduct did not warrant dismissal of an indictment, absent a showing of "demonstrable prejudice, or substantial threat thereof. . . ." 449 U.S. at 365, 367. The Court indicated that a "drastic remedy" would be imposed only where the conduct could not be corrected by "traditional remedies." 449 U.S. at 365-66, n.2.

In the present case, the defendant has received, by a different jury, a new, full sentencing trial, free of flawed conviction records. This traditional remedy has been wholly adequate to remove any prejudice to the defendant caused by any prosecutorial misconduct during the penalty phase of his first trial.

In arriving at this conclusion, we do not condone the indifferent, careless manner in which introduction of the documentary records of defendant's prior convictions was

handled by the prosecutor. During the hearing, the Commonwealth's Attorney admitted he knew, at the time the conviction records were proffered during the trial, that three of the purported convictions actually were only one. He testified, however, that he advised defense counsel of the discrepency [sic] during the trial, and that he assumed the error would be explained to the jury by defense counsel during closing argument.

The records in dispute covered convictions in Wake County, North Carolina, during the period 1964-1972, as noted in our opinion in *Evans*, 222 Va. at 774-75, 284 S.E.2d at 820. Apparently, most of the pre-1972 conviction records in that county had been destroyed. And, admittedly, the package of North Carolina documents available at trial was a "most incredible mess["], according to the hearing testimony of defendant's trial counsel. Also, the evidence shows that the prosecutor had furnished defense counsel with some conviction information prior to trial and that defense counsel had travelled to North Carolina prior to trial to examine records of defendant's convictions. And, we recognize there was the factual dispute concerning whether the prosecutor notified defense counsel, during the trial, about the inaccurate records. Nevertheless, the flawed documents were proffered by the Commonwealth's Attorney, who had the duty to assure, as far as reasonably possible, that the records were accurate. If their correctness was in doubt, or if the prosecutor knew they were inaccurate in any particular, the documents should not have been offered in evidence.

Next, the defendant asserts that the Commonwealth's "purposeful delay" in conceding error in the defendant's original sentencing proceeding until the new statutory scheme was enacted, violated defendant's due process right. We do not agree.

The trial court stated at the conclusion of the September 1983 hearing: "I think the record is absent any show-

ing that there was any maneuvering by the Attorney General or otherwise to put this case in position where, by some design, it would be cured by pending legislation." In the order entered after the hearing, the trial court stated that "the evidence fails to prove by a preponderance of the evidence that the Commonwealth purposefully and wrongfully delayed resolution of the defendant's petition for a writ of habeas corpus in order to achieve a tactical advantage as alleged by the defendant. . . ." The record amply supports the trial court's finding that there was no "purposeful delay" connected with the timing of the confession of error.

The Assistant Attorney General charged with handling defendant's first appeal and the habeas corpus proceeding testified in detail at the September 1983 hearing. In essence, he testified no effort was made within the office of the Attorney General to delay a confession or error in Evans' case until the amendatory legislation was approved. That evidence is credible, uncontradicted, and persuasive. The trial court examined *in camera* original files of the Governor's office and the Attorney General's office relating to drafting, introduction, consideration, and approval of the corrective legislation. No evidence to support defendant's claim was found by the trial court as the result of that examination. We have conducted a similar examination of those records and have confirmed the trial court's conclusion. Accordingly, there is no merit to defendant's claim of wrongful conduct.

Next, defendant contends that resentencing violated the prohibition against double jeopardy, under the facts of this case. Relying on *Bullington* v. *Missouri*, 451 U.S. 430 (1981), defendant argues that principles of double jeopardy bar resentencing him to death, after his original death sentence was set aside by the habeas corpus court. *Bullington* is inapposite. There, a defendant was convicted of capital murder, but the jury sentenced him to life imprisonment rather than death, under Missouri's

bifurcated trial procedure. Defendant obtained reversal of the conviction and a new trial. The Supreme Court barred a second attempt to impose the death penalty and ruled: "Because the sentencing proceeding at petitioner's first trial was like the trial on the question of guilt or innocence, the protection afforded by the Double Jeopardy Clause to one acquitted by a jury also is available to him, with respect to the death penalty, at his retrial." 451 U.S. at 446. But the obvious difference between that case and this is, in the present case, defendant has not been acquitted by a jury with respect to the death penalty.

In addition, the sentence to death in this case was set aside upon the ground of trial error and not evidentiary insufficiency. The defendant's sentence was annulled merely because the judicial process was defective, that is, evidence was received that should not have been offered. Accordingly, double jeopardy principles have not been offended. Under these circumstances, the accused has a strong interest in obtaining a fair readjudication of his punishment free from error, just as society maintains a valid concern for insuring that the guilty are punished and properly sentenced. *Burks* v. *United States*, 437 U.S. 1, 15 (1978).

Next, the defendant contends the trial court's instruction to the jury in the resentencing proceeding, that a sentence to life imprisonment required a unanimous vote of the jury, was contrary to the Virginia statutes and violated defendant's due process rights. Defendant dwells on the wording of the verdict forms contained in Code § 19.2-264.4(D). There, the death-penalty form requires the jury to "unanimously fix [defendant's] punishment at death," subsection (D)(1), while the life-imprisonment form merely concludes that the jury may "fix his punishment at imprisonment for life," subsection (D)(2). Defendant argues omission of the word "unanimously" from the life-sentence form demonstrates a legislative intent that a verdict of life imprisonment need not be unani-

mous. Accordingly, the defendant urges, the trial court erred in responding to a question from the jury and in specifying a requirement of unanimity for a life sentence. There is no merit to this contention.

Under established Virginia law, the verdict in all criminal prosecutions must be unanimous. *See* Rule 3A:17(a). And we perceive no legislative intention to change that rule by virtue of the language of Code § 19.2-264.4(D). Any possible ambiguity created by the omission of the word "unanimously" from subsection (D)(2) of § 19.2-264.4 is resolved by subsection (E) of the statute, which specifies: "In the event the jury cannot agree as to the penalty, the court shall dismiss the jury, and impose a sentence of imprisonment for life." Implicit in subsection (E), given our established law on unanimous criminal verdicts, is the conclusion that the jury must unanimously agree on both "the penalty" of death and "the penalty" of life imprisonment.

Finally, defendant asserts that sentencing him to death, when "all others" similarly situated with respect to the amended death penalty statutes received life sentences, deprived him of due process and equal protection under the Fourteenth Amendment to the United States Constitution and was fundamentally unfair. He contends that had the "grave errors which eventually caused the Commonwealth to concede the invalidity of Evans' death sentence been brought to this Court's attention at the time of his original appeal, his sentence of death would have been set aside." He says "there was simply no reason" to treat Evans differently from Patterson, whose case was decided only weeks prior to Evans' appeal. He contends that if he is now to receive the death penalty, while Patterson, "and perhaps others," did not, he will be denied the equal protection of the laws to which he is entitled. We disagree.

As the defendant points out, equal protection requires that similarly situated individuals be treated alike and

that, because non-suspect classification is involved here, the classification "rationally advances a reasonable and identifiable governmental objective." *Schweiker* v. *Wilson*, 450 U.S. 221, 235 (1981). We hold that Evans is not similarly situated with the defendant in *Patterson* with respect to the amendment to the death penalty statutes.

Virginia's current capital murder statutory framework became effective July 1, 1977. The amendment in question was approved and became effective March 28, 1983. Admittedly, both Evans and Patterson committed their crimes and were tried, convicted, and sentenced to death prior to the effective date of the amendment. Nevertheless, there is a significant difference between Patterson's case and Evans' case. Patterson's sentence to death was commuted to life imprisonment before the effective date of the statutory amendment; Evans' penalty was not set aside, and his resentencing trial did not commence, until after the effective date of the amendment.

As the Attorney General contends, Evans, in effect, asks us to decide that any defendant who originally was convicted and sentenced to death before the effective date of the amendment, must have the death sentence commuted to a life sentence *at any time* the death sentence is set aside. This would be the rule whether the death sentence was voided one day or twenty years after the effective date of the amendment. A state properly may draw the line at some point between those persons whose cases had progressed sufficiently far in the legal process to be governed by the old law and those individuals whose cases could properly subject them to the amended law. *Dobbert* v. *Florida*, 432 U.S. at 301. Because the subject statutory change affects only the procedure to be followed if a death sentence is set aside, we deem it more rational to classify individuals potentially affected by the change according to the time when the individual's death sentence was set aside, and the resentencing proceeding

commenced, rather than at the time when the person was originally tried and convicted.

In conclusion, Code § 17-110.1 requires this Court, in addition to any errors enumerated by appeals, to consider and determine whether the death sentence "was imposed under the influence of passion, prejudice, or any other arbitrary factor," and whether the sentence "is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Upon the issue of arbitrariness, the jury based its finding on the "future dangerousness" factor, which was supported fully by the evidence. Defendant's prior history revealed criminal convictions in the District of Columbia and North Carolina. In 1964, he threatened a police officer with a knife. In 1974, he threatened prison officials with a knife while demanding transfer to another prison facility. In 1978, he killed a person during an argument. In 1981, he assaulted and threatened credit union employees during an armed robbery.

The evidence regarding the present offense showed that Evans pretended to be a willing witness for the Commonwealth but that his sole purpose in cooperating was to engineer an escape after being brought to Virginia in custody from North Carolina. He planned to kill anyone who attempted to prevent his escape and he was acting on this intent when he killed the victim. In summary, we find that the sentence in this case was assessed by the jury free of the influence of passion, prejudice, or any other arbitrary factor.

Upon the issues of excessiveness and proportionality, our prior expression about Evans is as valid today as it was in 1981 when we decided his first appeal. "We have no hesitancy in concluding that juries generally in this jurisdiction will impose the death sentence for comparable crimes where inmates who kill prison guards have criminal records showing consistently turbulent combative con-

duct and the probability of committing criminal acts of violence that will threaten the peace and security of the law-abiding public." *Evans* v. *Commonwealth*, 222 Va. at 780, 284 S.E. 2d at 824.

For the foregoing reasons, we conclude that the trial court committed no error. In addition, we independently have concluded from a review of the entire record that the sentence of death was properly assessed. Accordingly, the judgment below will be

Affirmed.

VIRGINIA:

IN THE CIRCUIT COURT
FOR THE CITY OF ALEXANDRIA

F-5105

COMMONWEALTH OF VIRGINIA

v.

WILBERT LEE EVANS

ORDER

This day came the Attorney for the Commonwealth and the defendant, Wilbert Lee Evans (dob 01-20-46), who stands convicted of a felony, to-wit: Capital Murder, was led to the bar in the custody of the Sheriff, and came also Blair D. Howard, his counsel heretofore appointed.

Whereupon, the defendant, by counsel, moved the Court to grant a new trial, which motion was denied by the Court.

And the probation officer of this Court, to whom this case has been previously referred for investigation, appeared in open court with a written report which report she presented to the Court in open court in the presence of the defendant who was fully advised of the contents of the report and a copy of said report was also delivered to counsel for the accused.

Thereupon, the defendant and his counsel were given the right to cross-examine the probation officer as to any matter contained in said report and to present any addi-

tional facts bearing upon the matter as they desired to present. The report of the probation officer is hereby filed as a part of the record in this case.

Whereupon, the Court, taking into consideration all of the evidence in the case and the report of the probation officer, and it being demanded of the defendant if anything for himself he had or knew to say why judgment should not be pronounced against him according to law, and nothing being offered or alleged in delay of judgment, the Court sentences the defendant to death and fixes the date on which execution shall occur at September 7, 1984.

It is further ORDERED that the defendant shall pay costs of prosecution.

It is further ORDERED that pursuant to the provisions of § 19.2-319, Code of Virginia, 1950, as amended, execution of the aforesaid sentence be, and it is hereby, postponed pending review of this case by the Supreme Court of Virginia, and further

ORDERED that as soon as possible after the entry of this Order the defendant shall be moved and safely conveyed according to law from the jail of this Court to the said penitentiary, therein to be kept, confined and treated in the manner provided by law, and further

ORDERED that Gary Myers and Jonathan Shapiro, able and competent members of the Bar of this Court, are appointed to represent the defendant on his review and appeal, and further

ORDERED that the Clerk shall have the record transcribed and such transcripts shall be made a part of the record when filed in the Clerk's Office.

The Court certifies that at all times during the trial of this case the defendant was personally present and his counsel was likewise personally present and capably rep-

resented the defendant, for which services he is allowed an attorney's fee of $573.00 and out of pocket expenses of $365.98.

And the defendant is remanded to jail to await transfer to the penitentiary.

/s/ Wiley R. Wright, Jr.
WILEY R. WRIGHT, JR., Judge
Entered: March 7, 1984

ORDER

THIS MATTER came on to be heard on the 21st day of September, 1983 upon the motion of the defendant, by counsel, to bar the Commonwealth from seeking the death penalty in the above styled matter at any subsequent sentencing hearing upon the grounds alleged by the defendant in his written motion filed heretofore, namely that the Commonwealth's handling of the above styled matter constituted prosecutorial misconduct, that the Commonwealth purposefully delayed an admission of error in regards to the defendant's petition for a writ of habeas corpus in order to permit the Commonwealth to seek the death penalty pursuant to § 19.2-264.3 Code of Virginia (1950), as amended, that subjecting the defendant to a sentencing hearing before another jury after part of the evidence submitted during the first sentencing hearing has been declared inadmissible constitutes double jeopardy in violation of the defendant's Constitutional rights, that pretrial publicity has allegedly occurred so as to preclude a fair hearing, and that the amendment to § 19.2-264.3 Code of Virginia when applied to the above styled matter violates the Constitutional prohibition against *ex post facto* laws;

WHEREUPON the defendant appeared in open court, in the custody of the Sheriff, together with his attorneys, Jonathan Shapiro and Kenneth Labowitz, also came John E. Kloch, Commonwealth's Attorney, Richard S. Mendelson, Deputy Commonwealth's Attorney, S. Randolph Sengel, Assistant Commonwealth's Attorney, and Jerry Slonaker, Assistant Attorney General; and

AFTER RECEIVING EVIDENCE AND HEARING ARGUMENT of counsel, the Court is of the opinion and finds that the defendant has failed to prove by a preponderance of the evidence that the prosecution engaged in such misconduct or tactics of a nature which should pre-

clude the Commonwealth from again seeking the death penalty in this case; and the Court does

FURTHER FIND that the evidence fails to prove by a preponderance of the evidence that the Commonwealth purposefully and wrongfully delayed resolution of the defendant's petition for a writ of habeas corpus in order to achieve a tactical advantage as alleged by the defendant; and the Court is of the

FURTHER OPINION that the amendment to § 19.2-264.3 Virginia Code enacted by the 1983 session of the General Assembly and sometimes referred to in this proceeding as Senate Bill 12 does not violate the Constitutional prohibition against *ex post facto* law as applied to the facts of this case; and the Court is of the

FURTHER OPINION that the defendant's motion as hereinabove stated in regard to the allegation pertaining to pre-trial publicity be denied without prejudice to the right of the defendant to renew, if it becomes apparent during voir dire of the veniremen that pre-trial publicity has rendered obtainment of a fair and impartial jury impossible; and the Court is of the

FURTHER OPINION that the subjection of the defendant to another sentencing hearing does not constitute a violation of the Constitutional prohibition against double jeopardy; it is therefore

ORDERED that the said motion to bar the Commonwealth from seeking the death penalty in this case be and the same hereby is DENIED; it is

FURTHER ORDERED that this case be CONTINUED to Thursday, October 20, 1983 at 10:00 a.m., by agreement of counsel, for selection of a sentencing hearing date; and it is

FURTHER ORDERED, with the concurrance [sic] of defense counsel, that the defendant be remanded to the

custody of the Virginia Department of Corrections pending sentencing before this Court.

THE COURT CERTIFIES that the defendant was present during the hearing before the Court referred to herein, and that he was competently represented by his counsel.

ENTERED this 12th day of October, 1983.

/s/ Wiley R. Wright, Jr.
WILEY R. WRIGHT, JR., Judge

VIRGINIA:

IN THE CIRCUIT COURT
FOR THE CITY OF ALEXANDRIA

No. 7371

WILBERT LEE EVANS,
Petitioner,

v.

J. P. MITCHELL, WARDEN,
VIRGINIA STATE PENITENTIARY,
Respondent.

ORDER

This day came the petitioner, by counsel, and the respondent, by counsel, and for the reasons more fully set forth in the letter of respondent's counsel to this Court, dated April 12, 1983, respondent acknowledged that petitioner's death sentence should be vacated and prayed that the Commonwealth be granted leave to seek a new death sentence a[t] a re-sentencing proceeding pursuant to § 19.2-264.3 of the Code of Virginia.

For the foregoing reasons, the Court is of the opinion that that portion of the petition for a writ of habeas corpus which challenges the sentencing phase of petitioner's trial, should be granted to the extent that the sentence of death adjudged by this Court on June 1, 1981 should be set aside; it is, therefore

ADJUDGED and ORDERED that the petitioner's aforesaid death sentence is SET ASIDE. The Commonwealth is granted leave to notify the Court within 90 days if it shall seek to hold a new sentencing hearing in accordance with § 19.2-264.3. In such case, the Court will set a time to hear evidence and argument on the propriety of any such resentencing. In the event the Commonwealth does not seek to hold a resentencing hearing, or, in the event that the Court concludes that such a hearing should not be held, the petitioner's sentence shall be reduced to life imprisonment.

The Clerk is directed to forward a certified copy of this Order to petitioner, Jonathan Shapiro, Esquire, counsel for petitioner, the respondent, John Kloch, Commonwealth's Attorney of the City of Alexandria, and to Jerry P. Slonaker, Assistant Attorney General.

Entered this [illegible]nd day of May, 1983.

/s/ Wiley R. Wright, Jr.
Judge

I ask for this:

/s/ Jerry P. Slonaker
Counsel for Respondent

Seen and agreed:

/s/ Jonathan Shapiro
Counsel for Petitioner

A COPY TESTE:
Edward Semonian, Clerk
By: Stephanie A. Garris, Deputy Clerk

SUPREME COURT OF VIRGINIA

Record No. 811056

WILBERT LEE EVANS

v.

COMMONWEALTH OF VIRGINIA

Dec. 4, 1981

Stefan C. Long, E. Blair Brown, Alexandria, for appellant.

Jerry P. Slonaker, Asst. Atty. Gen. (Marshall Coleman, Atty. Gen., on brief), for appellee.

Before CARRICO, C.J., and HARRISON, COCHRAN, POFF, COMPTON, THOMPSON and STEPHENSON, JJ.

COCHRAN, Justice.

A jury found Wilbert Lee Evans guilty of capital murder as defined by Code § 18.2-31(f), in the willful, deliberate, and premeditated killing of a law-enforcement officer for the purpose of interfering with the performance of the officer's official duties.[1] In the second stage

[1] The jury also found Evans guilty of using a firearm in the commission of a felony and fixed his punishment at confinement in the penitentiary for one year. The trial court entered judgment on that verdict, the judgment was not appealed, and the conviction is not pertinent to the present appeal.

of the bifurcated proceeding conducted pursuant to the provisions of Code §§ 19.2-264.3 and -264.4, the same jury fixed Evans's punishment at death. After considering the probation officer's report required by Code § 19.2-264.5, the trial court imposed the death sentence recommended by the jury. We have consolidated our automatic review of this sentence with Evans's appeal from his conviction, as authorized by Code §§ 17-110.1(A) and -110.1(F), and we have given them priority on our docket in compliance with Code § 17-110.2. Evans asks us to reverse his conviction and remand the case for a new trial, or in the alternative to commute his death sentence to imprisonment for life.

I. Constitutionality of the Capital Murder Status.

Evans contends that Code § 19.2-264.4C[2] is unconstitutionally vague and overbroad in violation of his rights under the Eighth and Fourteenth Amendments to the United States Constitution. He relies entirely, however, upon arguments that, as he concedes, we have recently rejected in *James Dyral Briley v. Commonwealth*, 221 Va. 563, 577-80, 273 S.E.2d 57, 65-67 (1980). We reaffirm our views expressed in that case. *See also Martin v. Commonwealth*, 221 Va. 436, 439-40, 271 S.E.2d 123, 125-26 (1980).

[2] § 19.2-264.4C provides as follows:

> The penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim.

Evans also argues that Code § 19.2-264.2[3] is facially unconstitutional. He adopts the arguments that, as he further concedes, we rejected in *Smith v. Commonwealth*, 219 Va. 455, 248 S.E.2d 135 (1978), *cert. denied*, 441 U.S. 967, 99 S.Ct. 2419, 60 L.Ed.2d 1074 (1979), and *Waye v. Commonwealth*, 219 Va. 683, 251 S.E.2d 202 (1978), *cert. denied*, 442 U.S. 924, 99 S.Ct. 2850, 61 L.Ed.2d 292 (1979). *See Stamper v. Commonwealth*, 220 Va. 260, 267, 257 S.E.2d 808, 814 (1979), *cert. denied*, 455 U.S. 972, 100 S.Ct. 1666, 64 L.Ed.2d 249 (1980). We reaffirm our views expressed in those cases.

II. The Guilt Trial

The Commonwealth presented evidence that Evans, a prisoner, fatally shot Deputy Sheriff William Truesdale on January 27, 1981, while the officer was conducting him to jail in Alexandria. Evans admitted that he caused Truesdale's death with a firearm while the officer was engaged in the performance of his official duties. Evans consistently maintained, however, and so testified in his own defense, that he did not intend to kill Truesdale, and that the fatal shooting occurred accidentally while Evans was attempting to escape from police custody. Thus, the crucial question throughout the guilt trial was Evans's intent.

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[3] § 19.2-264.2. Conditions for imposition of death sentence.—In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed.

The uncontradicted evidence shows that Evans was in custody in North Carolina, that he volunteered to testify for the Commonwealth in a habeas corpus proceeding to be held in Alexandria, and that he was transported from North Carolina to Alexandria for that purpose. Noel I. Butler, Assistant Commonwealth's Attorney, who interviewed Evans in the Alexandria jail on January 26, 1981, found him cooperative, willing to testify, and able to provide testimony of value on behalf of the Commonwealth. On the following day, however, when Evans was brought into the courtroom to testify, he refused to do so, denied any knowledge of the case, and by his behavior caused the court to recess the proceeding.

Deputy Truesdale removed Evans and two other prisoners, Yvette Boone and Anthony Jasper, from the courthouse to jail in a van. Upon arriving outside the jail, the prisoners proceeded in single file up the steps leading to the jail door, Boone in front, followed by Jasper and then Evans. Jasper's right hand was handcuffed to Evans's left. As Jasper entered the door, Evans began to grapple with Truesdale on the steps. Evans, gaining possession of Truesdale's revolver, shot the officer in the chest from a distance of not more than one-half inch, pointed the weapon at Jasper but did not fire, freed himself by shooting open the handcuffs, and fled on foot. Running through a nearby law office, Evans threatened a secretary with the revolver before continuing his flight. Surrounded by pursuing officers in a nearby parking lot, Evans shot himself, inflicting a superficial wound, and was retaken into custody.

Several inmates of the Alexandria jail were called as witnesses for the Commonwealth to testify to certain inculpatory statements made by Evans. Before these witnesses testified, Evans objected to any reference they might make to charges pending against him in North Carolina on which he had not been convicted. The court overruled the objection on the ground that such evidence

would be admissible to show Evans's intent or state of mind.

Ralph Washington, an inmate, testified that Evans told him the night before the shooting that he was in Alexandria to testify in a case but that he was not going to say anything, that what he wanted was to "get the hell out." Evans asked Washington about jail security, what court was like, whether the guards carried guns, and whether he could wear civilian clothes to court. He asked another inmate about a good place to run if he escaped. Washington testified that Evans stayed up all night and "was like he was getting ready to go to war." Washington's testimony continued as follows:

> "A. He said he'd already come down; he was already facing life and he ain't got nothing to lose. He said he was going to try any means possible to escape.
>
> "Q. To what steps would he go?
>
> "A. Anybody that gets in his way to stop him, he would take him out.
>
> "Q. Take him out? What does that mean?
>
> "A. I guess kill them."

At this time the court cautioned the jury as follows:

> "Members of the jury, the statements of the defendant are being admitted into evidence not to show his legal situation in the State of North Carolina, but rather to show his state of mind or intention at the time he made the statements. You should consider those statements only in that respect."

Yvette Boone testified that she was brought from jail in North Carolina to the Alexandria jail to testify as a witness in the same case in which Evans was expected to testify. While they were still in jail in North Carolina, Evans attempted to coach her in preparation for her appearance in court. He also informed Boone that when he

went to court he was going "to run." In Alexandria, before Boone testified at the hearing, Evans told her that he had come not to testify but to escape. She, Jasper, and Evans were the prisoners being taken back to jail when Deputy Truesdale was shot. She saw Truesdale and Evans "tussling on the steps," but she was inside the jail door when she heard the shots fired.

Anthony Jasper testified that he occupied the same cell with Evans the night before the shooting, and Evans said that he had come to Alexandria "to try to escape." He asked Jasper the way to run to get to Washington, D.C. "He said he ain't got nothing to lose, you know . . . . He had two life sentences, something like that." The trial court promptly cautioned the jury that these statements were admitted only to show Evans's state of mind when he made the statements and not to prove whether he was facing punishment in North Carolina.

Jasper also testified that he and Evans were handcuffed together on the trip back to jail from the courthouse. Evans asked him whether Truesdale carried a weapon. Jasper had climbed the steps and was entering the jail door when Evans "yanked" him back. He saw Evans and Truesdale struggling over the handgun in Evans's hand. Evans had the gun in the air when Truesdale put his hand on it. Evans said, "Let me go or I'll kill your ass." Then the revolver "came down toward his side and he pulled the trigger." Evans then put the gun to Jasper's head, Jasper protested, and Evans shot the handcuffs off and fled.

Evans, testifying in his own defense, insisted that he had no intent to escape until he saw that Deputy Truesdale was off balance on the jail steps and decided to "run past him." He seized Truesdale's gun to "shoot the handcuffs off." He denied any intention of shooting the officer but asserted that he shot him accidentally while firing at the handcuffs.

Evans concedes that evidence was admissible to show that he planned in North Carolina to escape in Virginia and that, if necessary, he would kill anyone who stood in his way. He argues, however, that the trial court erred in admitting evidence that he was awaiting trial in North Carolina on charges for which he faced one or more life sentences. He relies upon the general rule recently restated in *Moore v. Commonwealth*, 222 Va. 72, 76, 278 S.E.2d 822, 824 (1981), that evidence of other offenses is inadmissible to prove guilt of the crime for which the accused is on trial. But this general rule, as we have frequently stated, is subject to numerous exceptions. Thus, evidence of other offenses is admissible to show motive or intent or to negate the possibility of accident. *Id.* at 76, 278 S.E.2d at 824-25. *See Brooks v. Commonwealth*, 220 Va. 405, 407, 258 S.E.2d 504, 506 (1979); *Kirkpatrick v. Commonwealth*, 211 Va. 269, 272, 176 S.E.2d 802, 805 (1970); *Williams v. Commonwealth*, 128 Va. 698, 711-12, 104 S.E. 853, 860-61 (1920).

Here, the trial court exercised commendable caution in twice instructing the jury during the guilt trial that the statements made by Evans in reference to charges pending against him in North Carolina were admitted into evidence solely for the purpose of showing his intent or state of mind. We hold that the statements were properly admitted for that purpose. The jury could reasonably infer that a prisoner held on charges for which he might be sentenced, upon conviction, to imprisonment for life would have a far more compelling motive for attempting to escape by force and violence than one held on charges for which he could receive only a lesser punishment.

We conclude that the trial court committed no error in its conduct of the guilt trial.

III. The Sentence Proceeding.

At the sentence proceeding which immediately followed the determination of guilt, the Commonwealth presented the testimony of one witness, Officer Louis Pough, of the

Alexandria Police Department. Pough testified that he had a conversation with Evans after the Truesdale shooting, and Evans was "concerned about returning to North Carolina on other charges." Evans told Pough that "it mattered not to him who was in his way," that he was from the District of Columbia and he "would try to escape again or be killed at home." Counsel for Evans objected to Pough's testimony about North Carolina charges and moved for a mistrial. The court overruled the motion but cautioned the jury to disregard the reference to "other charges" pending in North Carolina.

The other evidence presented at this proceeding consisted of Commonwealth Exhibits 19, 20, and 21, showing several of Evans's convictions in North Carolina and the sentences imposed thereon as follows:

February 21, 1964	— Breaking, entering and larceny	— 6 months
July 30, 1964	— Assaulting a police officer with a knife while the officer was in the peformance of his duties	— 6 months on road
July 30, 1964	— Engaging in an affray with a knife	— 6 months on road to run consecutively with other sentence of same date
September 30, 1964	— Engaging in an affray with a deadly weapon	— 4 months
December 15, 1970	— Assault & Battery & Assault Inflicting Serious Damage (hitting man in face with his fist, breaking his nose and knocking one tooth out)	— 60 days
July 12, 1972	— Escape from North Carolina Prison System	— 3 months
September 27, 1972	— Assault with a deadly weapon inflicting serious injuries	— not less than four years nor more than five years

Included in the jury instructions, all of which were unchallenged on appeal, was Instruction No. 14[4] stating in the alternative what the Commonwealth had to prove before the jury could fix Evans's punishment at death. After retiring to consider its verdict, the jury propounded two questions to the court, first, whether Evans's "past criminal record," to which Instruction No. 14 referred, included all the evidence "offered before and after the verdict," and second, whether Officer Pough's testimony could be considered as part of Evans's record. The court answered both questions in the negative and further instructed the jury that the only evidence of Evans's past criminal record which it could consider was contained in Exhibits 19, 20, and 21. Subsequently, the jury returned its verdict finding "after consideration of his prior history that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society," and fixing Evans's punishment at death.

[4] "INSTRUCTION NO. 14
"THE COURT INSTRUCTS THE JURY THAT:

"You have convicted the defendant of an offense which may be punished by death. You must decide whether the defendant shall be sentenced to death or to life imprisonment. Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt at least one of the following two alternatives:

"(1) *That, after consideration of his past criminal record there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society*; or

"(2) That his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder.

"If you find from the evidence that the Commonwealth has proven beyond a reasonable doubt either of the two alternatives, then you may fix the punishment of the defendant at death.

"If the Commonwealth has failed to prove either alternative beyond a reasonable doubt, then you shall fix the punishment of the defendant at life imprisonment." (Emphasis added).

Evans contends that the trial court erred in overruling his motion for a mistrial made when Officer Pough referred to other charges pending against Evans in North Carolina. There is no merit in this contention. The jury was aware that Evans faced charges in North Carolina because of references thereto properly admitted in the guilt trial to show his motive or intent. The trial court, however, expressly directed the jury to disregard the reference to North Carolina charges in considering the appropriate punishment to be imposed upon Evans. The court further instructed the jury, in answer to its questions, that Evans's past criminal record was limited to convictions shown in Exhibits 19, 20, and 21 and did not include anything revealed by Officer Pough's testimony.

We perceive no prejudice to Evans resulting from Pough's testimony, but if there was any prejudice, it was eliminated by the trial court's decisive corrective action. *See Stamper v. Commonwealth*, *supra*, 220 Va. at 277, 257 S.E.2d at 820, *Lewis v. Commonwealth*, 211 Va. 80, 83, 175 S.E.2d 236, 238 (1970). We hold, therefore, that the trial court did not err in overruling Evans's motion for a mistrial.

Code § 19.2-264.5[5] authorized the trial court after considering the report of the probation officer, "and upon

[5] § 19.2-264.5. Post sentence reports.—When the punishment of any person has been fixed at death, the court shall, before imposing sentence, direct a probation officer of the court to thoroughly investigate upon the history of the defendant and any and all other relevant facts, to the end that the court may be fully advised as to whether the sentence of death is appropriate and just. Reports shall be made, presented and filed as

good cause shown," to commute the death sentence of Evans to imprisonment for life. The report, however, was damaging rather than helpful to Evans. It showed that he had a criminal record more extensive than that introduced into evidence in Exhibits 19, 20, and 21, an unsatisfactory prison record, and an employment history which included acts of violence.

In 1968, a District of Columbia court sentenced Evans to serve a total of 720 days for assault and petit larceny. During his incarceration he received four disciplinary reports, including one for fighting. One former employer in the District of Columbia reported that in 1979 he refused to rehire Evans after Evans had "choked" a waitress during an argument. Several other former employers gave unfavorable reports about his work habits and behavior, but two reported that he was a good worker. His prison records in North Carolina revealed that seven disciplinary reports, one for unauthorized possession of a weapon, were filed against him from February 10, 1973, through September 28, 1975. Other convictions in North Carolina not listed in Exhibits 19, 20, and 21 included one in 1962 for assault with a deadly weapon, with a six months sentence suspended, one in 1965 for assault and battery, disorderly conduct, resisting arrest, and breaking arrest, with a six months sentence, and one in 1967 for assault and battery, with a thirty days sentence.

By order entered June 1, 1981, the trial court sentenced Evans to death in accordance with a jury verdict. Thereafter, Evans filed a motion to set aside the verdict of the jury and grant him a new trial. The trial court overruled the motion. As to the guilt trial, Evans based his motion upon the admission into evidence of the testi-

provided in § 19.2-299. After consideration of the report, and upon good cause shown, the court may set aside the sentence of death and impose a sentence of imprisonment for life.

mony of Washington and Jasper relating his statements about charges pending against him in North Carolina. Having held that this testimony was admissible, we hold that the trial court properly overruled Evans's motion insofar as it was based upon this ground. As to the sentence proceeding, Evans based his motion upon the alleged prejudicial effect of Officer Pough's testimony that Evans referred to the pending North Carolina charges. Having held that the trial court did not err in overruling Evans's motion for a mistrial based upon the same ground, we hold that the court did not abuse its discretion in overruling the post-trial motion insofar as it was based upon this ground.

We conclude that the trial court committed no error in its conduct of the sentence proceeding.

IV. Appellate Review of the Death Sentence.

Under the mandate of Code § 17-110.1 [6] we review the death sentence imposed upon Evans in the trial court. Evans contends that the sentence should not be affirmed because the evidence is insufficient to show either of the statutory prerequisites to its imposition. He argues that

[6] Code § 17-110.1 provides in pertinent part:

C. In addition to consideration of any errors in the trial enumerated by appeal, the court shall consider and determine:

1. Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; and

2. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

D. In addition to the review and correction of errors in the trial of the case, with respect to review of the sentence of death, the court may:

1. Affirm the sentence of death; or

2. Commute the sentence of death to imprisonment for life.

his past criminal record, as presented to the jury, fails to establish that there is a probability that he will commit criminal acts of violence that would constitute a continuing threat to society, and that there is no evidence that his killing of Truesdale was outrageously or wantonly vile, horrible, or inhuman. Therefore, he says, the death sentence is excessive and disproportionate to the penalty imposed in similar cases, and the jury must have been influenced by passion, prejudice, or other arbitrary factors.

The jury based its verdict in the sentence proceeding exclusively upon its finding that Evans had a proclivity for violence that made him a menace to society. Accordingly, we will assume, as the jury indicated by its verdict, that Evans' conduct in killing Truesdale was not outrageously or wantonly vile, horrible or inhuman within the purview of Code § 19.2-264.4C. Therefore, cases cited by Evans, such as *James Dyral Briley v. Commonwealth*, 221 Va. 563, 273 S.E.2d 57 (1980), *Linwood Earl Briley v. Commonwealth*, 221 Va. 532, 273 S.E.2d 48 (1980), *Turner v. Commonwealth*, 221 Va. 513, 273 S.E.2d 36 (1980), *Giarratano v. Commonwealth*, 220 Va. 1064, 266 S.E.2d 94 (1980), and *Clark v. Commonwealth*, 220 Va. 201, 257 S.E.2d 784 (1979), involving murders of exceptional atrociousness, are inapposite.

In *Stamper v. Commonwealth*, *supra*, the defendant was sentenced to death for each of three capital murders committed during an armed robbery. In two of the murders the jury's verdict fixing punishment at death was based entirely upon the defendant's proclivity for violence. His criminal record showed that he was sentenced in 1972 to serve twenty years in the penitentiary for a 1971 armed robbery and twelve months in jail for unauthorized use of an automobile, and was sentenced in 1974 to six months in jail as an accessory after the fact to an escape from the penal system. He was released on parole in 1976 and committed the triple murders in 1978.

A victim of the 1971 armed robbery testified that he was shot by Stamper and permanently disabled during the commission of that crime. We upheld the imposition of the death sentence for each of the three capital murders.

In the present case, Evans had a criminal record extending back to his youth showing a consistent pattern of aggression, bellicosity, and violence. Although only the last conviction presented to the jury, that of September 27, 1972, for assault with a deadly weapon inflicting serious injuries, resulted in imposition of a substantial prison sentence, there were other convictions for offenses in which Evans used a deadly weapon. One of these offenses was assaulting a police officer with a knife while the officer was in the performance of his duties. Another offense was escaping from the North Carolina prison system.

The jury could consider Evans's past criminal record together with the circumstances surrounding the commission of the Truesdale murder in determining whether he would probably commit other crimes of violence. *Smith v. Commonwealth*, *supra*, 219 Va. at 478 and n.4, 248 S.E.2d at 149. There was evidence that Evans came to Virginia with the single-minded purpose to escape, that he planned to kill, if necessary, any person who attempted to prevent his escape, and that, after fatally shooting Truesdale, he reaffirmed his intention to escape even if this meant that he would kill again or be killed. We hold that this evidence, which fitted into the pattern of violent conduct revealed by his past criminal record, was sufficient to support the jury's finding that he would be a continuing threat to society.

In its review of the case, the trial court, of course, had the benefit of a more extensive and detailed record of Evans's past criminal convictions not only in North Carolina but also in the District of Columbia, as well as his prison record and employment history. Thus, the trial

court had additional information, not available to the jury, justifying the court's refusal to commute the punishment of death fixed by the jury to imprisonment for life.

We find no evidence that the jury verdict and the trial court's review thereof were influenced by passion, prejudice, or any other arbitrary factor. To the contrary, the record reflects careful, conscientious, and objective determinations made successively by jury and trial judge.

We have stated that if juries generally in this jurisdiction impose the death sentence for comparable crimes, then the sentence is not excessive or disproportionate even though a codefendant or another accused may have received a lesser sentence. *Coppola v. Commonwealth*, 220 Va. 243, 259, 257 S.E.2d 797, 808 (1979), *cert. denied*, 444 U.S. 1103, 100 S.Ct. 1069, 62 L.Ed.2d 788 (1980), applied in *Stamper v. Commonwealth*, *supra*, 220 Va. at 283, 257 S.E.2d at 824. In *Martin v. Commonwealth*, 221 Va. 436, 271 S.E.2d 123 (1980), the only other appeal presented to us in which a defendant was sentenced to death for murdering a police officer in violation of Code § 18.2-31(f), we reversed the conviction and remanded the case for a new trial because of error in selection of the jury. Therefore, we have no comparable cases to consider in determining whether the death sentence imposed upon Evans is excessive or disproportionate.

After carefully considering the record in this case, we hold that the sentence is not excessive or disproportionate. We have no hesitancy in concluding that juries generally in this jurisdiction will impose the death sentence for comparable crimes where inmates who kill prison guards have criminal records showing consistently turbulent, combative conduct and the probability of committing criminal acts of violence that will threaten the peace and

security of the law-abiding public.[7] Accordingly, we will affirm the sentence of death.

Affirmed.

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[7] For more than a century prior to enactment of Code § 18.2-31(c) by Acts 1975, chs. 14 and 15, the death sentence was mandatory for an inmate who killed a prison guard. Acts 1843-44, c. 72, and successor statutes. Juries imposed the punishment required under these statutes, *e.g.*, *Ruffin v. Commonwealth*, 62 Va. (21 Gratt.) 790 (1871); *Brown v. Commonwealth*, 132 Va. 606, 111 S.E. 112 (1922); *Hart v. Virginia*, 298 U.S. 34, 56 S.Ct. 672, 80 L.Ed. 1030 (1936) (appeal denied by this Court, Supreme Court held there was no substantial federal question); *Jefferson v. Commonwealth*, 214 Va. 747, 204 S.E.2d 258 (1974); *Washington v. Commonwealth*, 216 Va. 185, 217 S.E.2d 815 (1975); *Lewis v. Commonwealth*, 218 Va. 31, 235 S.E.2d 320 (1977).

Until alternative punishment was added by Acts 1914, c. 240, the single sanction in Virginia for murder of the first degree was death. Juries imposed the death sentence both before and after the 1914 amendment for first degree murder of a police officer, *e.g.*, *Davis v. Commonwealth*, 89 Va. 132, 15 S.E. 388 (1892); *Gray v. Commonwealth*, 150 Va. 571, 142 S.E. 397 (1928); *Delp v. Commonwealth*, 172 Va. 564, 200 S.E. 594 (1939).

IN THE
SUPREME COURT OF VIRGINIA
AT RICHMOND

Record No. 811056

WILBERT LEE EVANS,
Appellant,

v.

COMMONWEALTH OF VIRGINIA,
Appellee.

BRIEF ON BEHALF OF THE COMMONWEALTH

J. MARSHALL COLEMAN
Attorney General of Virginia

JERRY P. SLONAKER
Assistant Attorney General

Supreme Court Building
Richmond, Virginia 23219

* * * *

III

THE VERDICT OF THE JURY ON SENTENCE WAS NOT IMPOSED UNDER THE INFLUENCE OF PASSION, PREJUDICE AND OTHER ARBITRARY FACTORS, AND THE DEATH SENTENCE IN THE INSTANT CASE IS NOT DISPROPORTIONATE AND EXCESSIVE TO THE PENALTY IMPOSED IN SIMILAR CASES UNDER VIRGINIA LAW.

The jury found that after consideration of the defendant's prior record there existed a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society. (App. 9). Accordingly, the jury set his punishment at death.

The defendant's previous criminal records submitted to the jury at the penalty phase were Commonwealth's Exhibits 19, 20 and 21. These records revealed the following past convictions and sentences:

Convictions	(Date & type of conviction)	Sentences
1. Feb. 21, 1964 (See Commonwealth's Exhibit 21; Supp. App. 5-6)	— "Breaking, Entering & Larceny"	"6 months"
2. July 26, 1964 (See Commonwealth's Exhibit 21; Supp. App. 7)	— Assault on a police officer with a deadly weapon while the officer was in the performance of his duties.	"6 months on road"
3. July 26, 1964 (See Commonwealth's Exhibit 21; Supp. App. 8)	— Engaging in an affray with a deadly weapon	"6 months on road" to run consecutively with other sentence of same date.
4. September 30, 1964 (See Commonwealth's Exhibit 21; Supp. App. 9)	— Engaging in an affray with a deadly weapon	"4 months"
5. Dec. 15, 1970 (See Commonwealth's Exhibit 19; Supp. App. 10-11)	—"Assault & Battery & Assault Inflicting Serious Damage" (hitting victim in the face with his fist, breaking his nose and knocking one tooth out) (misdemeanor)	60 days
6. July 12, 1972 (See Commonwealth's Exhibit 20; Supp. 12-13)	— Escape from N.C. Penitentiary	3 months
7. Sept. 27, 1972 (See Commonwealth's Exhibit 21; Supp. App. 14)	— Assault with a deadly weapon inflicting serious injuries	Not less 4 years nor more than 5 years.

Most of the foregoing offenses—even though many were misdemeanors—involved serious violence to other human beings. Four offenses concerned use of a deadly weapon, and indeed one of those four convictions was for assault on a police officer with a deadly weapon while that officer was in the performance of his duties. One conviction was for escape from the North Carolina Penitentiary. (See Supp. App. 5-14).

Obviously the jury was not required to consider these prior convictions in a vacuum but rather in the light of the characteristics of the instant capital murder and the defendant's state of mind and attitude toward society and his fellow man as revealed by his own actions and statements.[7] In this light the defendant's criminal record reveals that he has a deep-seated and callous disregard for human life and rules of society.

The evidence presented at trial shows that the defendant announced to his cellmates that he would escape by any means and kill without compunction, if necessary to accomplish that purpose. Then the next morning he proceeded to do just that. The defendant had calmly reflected at length on how he might escape and that he would kill anyone who stood in his way. He connived well in advance to agree to come to Alexandria from North Carolina for the ostensible purpose of testifying but with the real motive of escaping from custody—while fully realizing and accepting the prospect of killing someone in the process.

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[7] Under the Virginia statute, § 19.2-264.2, prior criminal conduct is "the principal predicate for a prediction of further 'dangerousness.'" *Smith* v. *Commonwealth*, 219 Va. 455, 478, 248 S.E.2d 135 (1978), *cert. denied*, 441 U.S. 967 (1979). The jury, however, must consider all of the relevant evidence before determining whether the defendant has such a propensity to violence as to make him a menace to society. *Stamper* v. *Commonwealth*, 220 Va. 260, 275-277, 257 S.E.2d 808 (1979), *cert. denied*, 445 U.S. 972 (1980).

Even the murder of Deputy Truesdale did not temper the defendant's personal commitment to escaping and his willingness to kill to accomplish that goal. Subsequent to shooting Truesdale he told Officer Pough that he would attempt to escape again by any means possible and that it mattered not to him who was in his way. (App. 18). By the defendant's own admissions his state of mind and intent have not changed.

The record certainly sustains the jury's conclusion that there is a probability that the defendant would commit acts of violence that would constitute a continuing serious threat to society.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

No. 81-6131

WILBERT LEE EVANS,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

Upon A Petition For Writ Of Certiorari To The
Supreme Court Of Virginia

BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

Office of the Attorney General
Supreme Court Building
101 North Eighth Street
Sixth Floor
Richmond, Virginia 23219

* * * *

The other evidence presented at this proceeding consisted of Commonwealth Exhibits 19, 20, and 21, showing several of Evans' convictions in North Carolina and the sentences imposed thereon as follows:

February 21, 1964	— Breaking, entering and larceny	— 6 months
July 30, 1964	— Assaulting a police officer with a knife while the officer was in the performance of his duties	— 6 months on road
July 30, 1964	— Engaging in an affray with a knife	— 6 months on road to run consecutively with other sentence of same date
September 30, 1964	— Engaging in an affray with a deadly weapon	— 4 months
December 15, 1970	— Assault & Battery & Assault Inflicting Serious Damage (hitting man in face with his fist, breaking his nose and knocking one tooth out	— 60 days
July 12, 1972	— Escape from North Carolina Prison System	— 3 months
September 27, 1972	— Assault with a deadly weapon inflicting serious injuries	— not less than four years nor more than five years

Included in the jury instruction, all of which were unchallenged on appeal (See Appendix a at 9), was Instruction No. 14 stating in the alternative what the Commonwealth had to prove before the jury could fix Evans' punishment at death. After retiring to consider its verdict, the jury propounded two questions to the

court; first, whether Evans' "past criminal record," to which Instruction No. 14 referred, included all the evidence "offered before and after the verdict," and second, whether Officer Pough's testimony could be considered as part of Evans' record. The court answered both questions in the negative and further instructed the jury that the only evidence of Evans' past criminal record which it could consider was contained in Exhibits 19, 20, and 21. (April 17 tr. 610-611). Subsequently, the jury returned its verdict finding "after consideration of his prior history that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society," and fixing Evans' punishment at death.

* * * *

VIRGINIA:

IN THE CIRCUIT COURT
FOR THE CITY OF ALEXANDRIA

F-5105

COMMONWEALTH OF VIRGINIA,

vs.

WILBERT LEE EVANS,
Defendant.

Alexandria, Virginia
Wednesday, September 21, 1983

The proceedings commenced at 10:30 o'clock a.m.

BEFORE:

THE HONORABLE WILEY R. WRIGHT, JR.

APPEARANCES:

JOHN E. KLOCH, Esq., Commonwealth Attorney; and RICHARD S. MENDELSON, Esq., Assistant Commonwealth Attorney; and RANDOLPH SENGEL, Esq., Assistant Commonwealth Attorney;

JONATHAN SHAPIRO, Esq., 1019 King Street, Alexandria, Virginia 22314; and KENNETH E. LABOWITZ, Esq., 118 North Alfred Street, Alexandria, Virginia 22314, counsel for the defendant.

* * * *

[22] THE COURT: Call your first witness.

MR. SHAPIRO: We call John Kloch and ask for leave to cross-examine.

THE COURT: You may do so.

Whereupon,

JOHN E. KLOCH,

was called as a witness by and on behalf of the defendant, and, after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SHAPIRO:

Q You're John Kloch?

[23] A Yes.

Q And your title?

A Commonwealth Attorney for the City of Alexandria.

Q You were Commonwealth Attorney at the time Mr. Evans was tried; in fact, prosecuted him, is that correct?

A Along with Randy Sengel, yes, sir.

Q You had been Commonwealth Attorney for some time prior to that?

A Yes, sir.

Q Had you ever handled a death case before?

A No, sir.

Q All right.

And it's true, is it not, that you paid particular attention to this case in light of its seriousness?

A I'd say yes, to all cases.

Q All right.

It's true, is it not, Mr. Kloch, that sometime prior to the trial you asked or directed Mr. Sengel to go to North Carolina, in the company of a police officer, to investigate Mr. Evans' police record?

A That among a lot of things. That was included in what he was there for.

Q And he, in fact, prepared a written report for you, [24] typewritten, concerning Evans' prior conduct; is that correct?

A Yes, he did.

Q All right.

And that report is, in fact, the same one that I attached to my memorandum, is that correct?

A Yes, sir.

Q A five-page typewritten report?

A I don't recall how many pages, but approximately, yes.

Q All right.

And it's your position now that concerning the report that Mr. Sengel was able to obtain that some of them were really judgments of conviction which had been appealed; is that correct?

A You say that's my position now? Maybe I don't understand the question.

Q You understood that in February didn't you?

A In February of when?

Q Yet me approach it another way.

A I don't know what you're getting at.

Q You're familiar with Commonwealth's Exhibit 21 as you had it at Mr. Evans' trial?

[25] A Yes, sir. If you're saying that I knew that there were two convictions and they were appealed resulting in one conviction, yes, sir.

Q All right.

Would you review Commonwealth's Exhibit 21, please.

(Exhibit handed to the witness.)

A All right.

Q Mr. Kloch, I'd like you to compare the various documents contained in Exhibit 21 with this chart I have prepared just to make certain that we're dealing with copies of Exhibit 21, aside from the first two pages which are the certification of the clerk in North Carolina.

A On page D there's a part cut off from the original.

Q At the very bottom?

A Yes. It says that notice of appeal bond and dollar —I can't read it, but that appears to be cut off of your exhibit, which is D, engage in an affray with a dangerous weapon, which is one of the ones you're talking about. They appear to be the same pages. Other than they're obviously separated in your case and do not have the certification on that, they appear to be the same pages.

Q And in the same order?

A Yes, sir.

[26] Q All right.

You will notice I have labelled them in the order you reviewed them, A, B, C, D, E, F, and G.

A Yes.

I would say that the exhibit you showed me, which was Commonwealth's Exhibit 21, has been taken apart. I'm assuming that it is in the same order that it was at trial.

Q All right.

Now, just so we're clear, when you received Mr. Sengel's report, you knew that conviction order C, which is for assault on an officer with a deadly weapon, had been appealled and nol-prossed; is that correct?

A Yes, sir.

Q And you knew that conviction order D, which is an affray with a deadly weapon, had been appealed to a higher court?

A Were those convictions that occurred on the same date?

Q That's correct.

A I knew both offenses occurred on the same date and both convictions occurred on the same date, yes, sir.

Q Were you aware what I have labelled E, which is a commitment for engaging in an affray, was actually the [27] result of an appeal from conviction D, engaging in an affray?

A Yes, sir.

Q All right.

So, what appears to be three convictions were, in fact, but one?

A Yes, sir.

Q All right.

THE COURT: What was E, again?

MR. SHAPIRO: E, Your Honor?

THE COURT: Yes.

MR. SHAPIRO: E is a commitment to a state prison for engaging in an affray.

BY MR. SHAPIRO:

Q Did you personally tell Steve Long or Blair Brown of what you knew about these records? And I'm not speaking of what you made available to them in the way of documents. Did you ever tell them, from your mouth, what you knew?

A Yes, sir.

Q Prior to trial?

A I don't think I told them anything about any of the records prior to trial. I mean, we did it through a discovery process.

Q And, in fact, the first time you told them, by your [28] own mouth, was after Mr. Evans had been convicted; is that correct?

A Yes, sir.

Q And that came after a bench conference concerning the admissibility of these documents; is that correct?

A Yes, sir.

Q You remember that bench conference?

A I have a fairly good recollection.

Q And you recall then that Mr. Long made objections to, if not all, as many of these records as he could probably object to and he didn't want them to go to the jury; is that correct?

A I think he only made an objection to pages 2 and 3 of this exhibit.

Q All right.

Do you recall 2 and 3—

A (Interposing) Which is your A and B, I guess.

Q All right.

So, it was your understanding that Mr. Long was complaining about—

THE COURT: (Interposing) Let's get the transcript if need be.

MR. SHAPIRO: The transcript, I intend to produce [29] and examine from it.

BY MR. SHAPIRO:

Q Your understanding was Mr. Long was objecting to A and B, A being an indictment or corresponding document for breaking and entering and larceny, and B being the conviction for a single crime of breaking and entering and larceny; is that correct?

A My recollection was the objection, we couldn't prove that they—because there was no number on B, that it was the conviction for the indictment on A.

Q All right.

You recall that at that bench conference Judge Wright dealt with each of these documents in turn, asking for comments on each?

A He asked—My recollection is he asked the defense whether they had any objection.

Q All right.

Now, this was prior to you telling Mr. Long the problems you first discovered?

A Prior to my telling him from my mouth, that's correct.

Q And you recall Judge Wright going through what I've labelled A, B, C, asking if there were any objections, D, [30] was there any objection, E, any objection. Did you tell Judge Wright about the problems you discovered?

A No. It was not really a problem that I discovered.

Q There's no question pending.

A Okay.

Q Now, after Mr. Evans was convicted, you know he took an appeal?

A Yes.

Q That would be the automatic appeal provided by law?

A Yes, sir.

Q And that appeal was handled by Mr. Slonaker's office, is that correct?

A That's correct.

Q Your office had contact with Mr. Slonaker's office to help them prepare the brief, is that true?

A No, sir.

Q You had no contact whatsoever?

A Very little contact.

Q Let's talk about you. Did you have any contact?

A Not that I specifically recall, other than their handling it.

Q You don't recall Mr. Slonaker calling and asking what was meant by that, what happened here, what was the [31] result of this conference, nothing like that?

A I can only say the records, they go from the records.

Q Are you aware that Mr. Slonaker's office had any conversations with any of your assistants or other personnel?

A I don't have any present recollection of conversations.

Q Did Mr. Slonaker send you a copy of his brief to review?

A No, sir.

Q He did not?

A No, sir. I don't recall that, no, sir.

Q All right.

A There again, they normally do not.

Q You had an interest in the progress of the Evans case, no doubt, even after conviction?

A As I do all cases, yes, sir.

Q This had been your only death penalty case, the only case in which you had asked to send someone to the electric chair.

A That's correct.

Q All right.

Did you ask for a copy of Mr. Slonaker's brief?

[32] A No, sir.

Q Did you appear in the Supreme Court of Virginia to hear oral argument?

A No, sir.

Q You do read the opinions of the Supreme Court of Virginia, do you not?

A We get them in huge packs. I give them a cursory review, yes, sir.

Q You are charged with the responsibility of prosecuting criminal offenses in Alexandria?

A That's correct.

Q Is not it important to you, as a lawyer, as a professional, to know what the Supreme Court of Virginia has decided in criminal cases?

A Yes, sir.

Q That's why you order those advance sheets?

A They come automatically, but that's why I read them.

Q And did you read the Evans opinion?

A I'm sure I did.

Q All right.

Let me show you—

MR. MENDELSON: (Interposing) Your Honor, if I might interject, the line of inquiry by defense at this point [33] is what Mr. Kloch might or might not have done after the Supreme Court of Virginia decision. I believe the issue is whether the prosecutor was involved with prosecutorial misconduct. I think the line of questioning is irrelevant.

MR. SHAPIRO: Your Honor, the misconduct we allege did not end with the trial, but the error, if that's what it was, was repeated two more times. Because, as

I'm about to show, Mr. Kloch—In its opinion, the Supreme Court of Virginia listed seven purported offenses by Mr. Evans. Mr. Kloch has told us now he read that, and I want to ask him what he did about it once he found out they upheld a death sentence based on facts he knew weren't true.

MR. MENDELSON: I don't think that's relevant for this proceeding. The question is did Mr. Kloch engage in prosecutorial misconduct in the way he briefed it in his pre-trial memorandum.

THE COURT: I don't believe the pre-trial memorandum alluded to what took place in the Supreme Court. I think I injected that in the case by my question. But I do think it's material and relevant.

MR. SHAPIRO: Thank you, Your Honor.

But, in fact, I did mention in my brief that the error was repeated in the Supreme Court of Virginia and—

[34] THE COURT: (Interposing) You did in the sense that the Supreme Court relied on all of those convictions when reviewing the sentence. To that extent, you did mention it, that's correct.

MR. SHAPIRO: Your Honor, I want to move into evidence a copy of the Supreme Court's decision in Evans versus Commonwealth, decided December 4th, 1981. My only copy, unfortunately, is marked, but Mr. Mendelson tells me there is another copy in the *habeas* file.

THE COURT: Any objection to that, Mr. Mendelson?

MR. MENDELSON: No, sir. I believe it's part of the record in this case.

THE COURT: It's already part of the record?

MR. SHAPIRO: It is, indeed.

BY MR. SHAPIRO:

Q Mr. Kloch, I want to show you what purports to be a copy of the Supreme Court decision in Evans versus

Commonwealth, and ask you to look at page 709. You remember that document, don't you?

(Document handed to the witness.)

A This document (indicating)?

Q A copy of the Evans opinion.

A I read the Evans opinion, yes, sir.

[35] Q And you therefore read the Supreme Court's recitation of his prior record; is that correct?

A I can't say that's accurate. The main issue I was concerned with in this case didn't deal with the sentencing phase. I had no reason to believe there was a problem with the sentencing phase. It was with another issue I was especially concerned about. I would say I probably glossed over this part of it.

Q Do I understand you were not concerned that the jury had received erroneous records of conviction?

A I think at that time it was a non-issue, basically, because the defense counsel sought to use that as their strategy. And I think, in fairness, it never occurred to me to read this in view of comparing it to what actually went in, no reason to compare each one of these to try to recall whether that actually went in or not.

Q So, the fact that those records went in was of no special concern to you, either at the time that happened or at the time you read the Supreme Court brief?

A Well, they concerned me. But at the time they went in, to me, it was a matter of defense strategy, that that's the way they were going to argue the case. And it never was an issue to me. And when it got to this stage, it certainly [36] was not an issue at that time.

Q You don't mean it was a defense strategy to let the jury believe that Evans had more convictions than he really had?

A Well, I think that's probably one interpretation. It was the defense strategy to try to minimize all the convictions he had and to downplay them. I think that was the defense strategy.

Q In light of that, it would make no sense at all for them, if they knew those convictions were invalid, to let the jury have them.

A And those both occurred on the same day, certainly that could be a defense strategy. First of all, they could argue the age of those cases and the fact that there was a case where you've got a certain penalty and it was appealled and he got a lot less, one was even nol-prossed. That strategy has been used before. I had no reason to believe it would not be used here. In what amounts to our General District Court and Circuit Court, that strategy has been used before by defense counsel.

Q To let the jury think there are more convictions than there really are?

A To let them know they're not as significant as they [37] thought I was going to argue they were.

Q And your hands were clean once you told Steve Long; is that your position?

MR. MENDELSON: I object to that question. He's asking Mr. Kloch whether his hands are clean. That's an issue to be decided.

THE COURT: Objection sustained.

BY MR. SHAPIRO:

Q You thought your responsibilities had ended once you told defense counsel of the problems and it was their ball game from that point on?

A Well, I think you need to know a little bit more background of where we were at that point. First of all, I knew that both Mr. Brown and—I believe both Mr. Brown and Mr. Long actually went to North Carolina to look at the same records that we looked at. One or both of them confided in me that they had been there. They knew very well what his record was. And I think they thought they actually knew more than I did about it because they had been down there reviewing the same records that we had.

Secondly, I knew Mr. Long to have been a former state prosecutor and former federal prosecutor. He handled

many serious cases before, some with me. I knew Mr. Brown to [38] have been a clerk of this court, spent several years in actual clerking with the court and to be familiar with court records. I knew they had talked to an attorney down in North Carolina regarding Mr. Evans' record. And they had Mr. Evans, their client, to confide in, too. They communicated to me they knew his record very well.

In addition to that, we provided a rap sheet. We provided the docket entries of the North Carolina conviction and ultimate appeal conviction on one of the charges. I had every reason to believe, at that time, that they knew full well what his record was probably better than I did. And it came as no surprise to me that even when we told them that there was no surprise as to what the record really reflected.

Q It didn't surprise you that they said we'll just go ahead and argue and let the jury know that it seems he has convictions he did not really have?

A That's not what he said. But it came as no surprise to me he was going to further try to minimize the defendant's involvement in the criminal justice system.

Q Aside from what you told or didn't tell Mr. Long, as a prosecutor, is not it true that you have an independent duty to make sure a jury imposes a sentence based on an accurate record?

[39] A To the extent it does not interfere with defense counsel's strategy.

Q If they want to let the jury believe otherwise, that's all right?

A I don't think they let the jury believe otherwise. Mr. Long did argue to the jury the fact that those three convictions were only one conviction.

Q All right.

Now, you're referring, of course, to page 601 of the transcript of April 17th, 1981. Would you look at that, please.

(Transcript handed to the witness.)

THE COURT: What's the page, again?
MR. SHAPIRO: 601, Your Honor.
THE WITNESS: Yes, sir.

BY MR. SHAPIRO:

Q And that's the beginning, is it not, of Mr. Long's argument to the jury on sentencing?

A I believe it was.

Q And Mr. Long says, "Ladies and gentlemen of the jury, Mr. Kloch inadvertently forgot to tell you something about Exhibit 21. You received a copy of it." There happens to be two items referred to in there which, in fact, [40] are referred to in the final argument. So, in fact, you're looking at three convictions and they're only one; and you took that to mean, well, now, he's telling the jury that Mr. Evans does not have a conviction for assaulting a police officer with a deadly weapon and, in fact, he does not have a conviction for an affray with a deadly weapon. That was his explanation; is that correct?

A Well, that he argued that those three documents really were one ultimate conviction, yes, sir.

Q All right.

Did it concern you at all that on the following page, page 602, where Mr. Long reviewed each of the convictions that you had introduced, that he said the first one is in '63 or '64 when he, Mr. Evans, was eighteen, and it constituted breaking and entering a gas station and stealing twenty-six dollars worth of candy? He was referring to A and B?

A Yes.

Q And then he says for that he received a sentence, if I'm not correct, of six months. From 1963 or 1964 there were a number of misdemeanors. Now, do you know what he was referring to there?

A I assume—I don't have a particular recollection [41] of that, but—

Q (Interposing) Is not it true that the only misdemeanors occurring in 1963 or '64 were these three, C, D, and E, and that there was only one misdemeanor? And he knew it and was wrong when he said a number of misdemeanors. Did you hear him say that?

A I don't have a particular recollection. But if I did, it would not have changed. I assume it would follow to show those are not a number of misdemeanors, that there's only really one.

Q Mr. Kloch, I want to ask you several questions about the events occurring after the *habeas* petition was filed. You had conversations with Mr. Slonaker from time to time, didn't you, about the progress of the *habeas* litigation?

A Yes, sir.

Q And you knew, did you not, that Mr. Slonaker had serious problems with what happened in the case concerning those records?

A In terms of the ultimate *habeas*, yes, sir.

Q All right.

And you discussed with him, did you not, your options should Commonwealth actually concede that?

[42] A I'm sure we did at some point during the entire pendency. If we didn't discuss it, I certainly would have been cognizant of it in my own mind.

Q Did you discuss with him the possibility of holding a resentencing?

A Yes, sir.

Q All right.

And, of course, you follow the activities of the legislature, do you not?

A To some extent, yes, sir.

Q Were you aware that S-12 was being considered?

A Yes, sir. I was aware of it, yes, sir.

Q All right.

And you discussed that with Mr. Slonaker, did you not?

A I think to the extent that we were aware it was pending, yes, sir.

Q You said more to each other than just S-12 is pending; you talked about it in reference to the Evans case; is that not true?

A I suspect they were both mentioned in the same conversation, yes, sir.

Q All right.

[43] And you knew, did you not, that if S-12 passed it would make your job, should you decide to try and seek a resentencing of Mr. Evans, a lot easier; is not that right?

A Yes, sir.

There are two theories. In fairness, it would make it easier. More clear I think would be a better word.

Q And you and Mr. Slonaker discussed that?

A Yes, sir, I think in some manner we discussed it.

MR. SHAPIRO: Court's indulgence.

BY MR. SHAPIRO:

Q Two more questions, and they're disjointed ones. One, concerning your conversation with Mr. Long back at the sentencing phase of the trial in which you testified you pointed out to him the problems here, what did he tell you?

A Verbatim?

Q As best you can recall.

A The best I can recall is "leave them in there; we'll argue them to the jury or we'll argue that to the jury or we'll cover it with the jury."

Q And the other question, Mr. Kloch, again concerning your bench conference with Mr. Long, Mr. Brown and Judge Wright, concerning the admissibility of these documents, I ask you, as Judge Wright went through the documents, if you [44] indicated whether there was any problem with them? Did you ever tell the judge what you knew about these three pieces of paper, C, D, and E?

A No, sir.

MR. SHAPIRO: No further questions.

* * * *

[67] STEFAN C. LONG,

was called as a witness by and on behalf of the defendant, and, after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SHAPIRO:

Q Mr. Long, would you state your name for the record, please?

A Stefan C. Long.

Q And your occupation?

A Attorney-at-law.

[68] Q How long have you been attorney?

A Twenty years August 13th of this year.

Q Prior to going into private practice, what did you do?

A Went to college and law school, and worked for a law firm for seven years.

Q You were an Assistant United States Attorney, were you not?

A After I got through law school, I became an Assistant United States Attorney.

Q And you were an Assistant Commonwealth Attorney?

A An Assistant Commonwealth Attorney.

Q You represented Wilbert Evans at his capital murder trial?

A Yes, I did.

Q Along with Blair Brown?

A Right.

Q To the best of your recollection, Mr. Long, when did you first see the Commonwealth's sentencing exhibits?

A 19, 20 and 21?

Q Yes, sir.

A Right before the luncheon break.

Q On the last day of trial?

[69] A On the last day when we got into the aspect of the penalty.

Q And Exhibits 19, 20, and 21 consisted of various records of conviction or what purported to be records of conviction?

A Commitments, indictments, convictions and the like from North Carolina.

Q Did you have any strategy concerning those records? What did you want to do with them?

A Tried to keep them out, because, quite frankly, the way they were packaged they were confusing, at best. But, in addition to that, there were a large number of things, so we tried to keep them out. And failing that, we tried to minimize the effect they had by indicating they were mostly misdemeanors.

Q If you had an opening to keep out any one of those pages in 19, 20, and 21, would you have taken it?

A Oh, there's no question about that. If I could have kept out the convictions, I would have tried to keep them out.

Q During the sentencing phase or prior to the sentencing phase, did you have any knowledge that the purported conviction for assaulting a police officer with a [70] deadly weapon, which I've labelled C on this chart, and the one next to it, D, which is a purported conviction for an affray with a deadly weapon, were, in fact, not convictions at all?

A No, I didn't.

Q If you had known that, what would you have done?

A We would have objected to them going in, particularly the assault on an officer.

Q And why was that?

A Well, because the whole aspect of the trial was the commission of a killing on a police officer, an officer involved with the law. And, certainly, that, in addition to showing a propensity for violence, also shows a pro-

pensity for violence towards a police officer or an officer who is involved with the law.

Q Did anyone ever say to you, Mr. Long, these purported convictions, C and D, really had been appealled and are represented in E?

A Yes, as a matter of fact, they did. I don't remember whom it was, but it was certainly a considerable period of time after the trial, after the appeal to the Virginia Supreme Court, and after the petition for writ of certiorari to the Supreme Court had been denied.

[71] Q That's the first time you learned of it?

A The first time I learned of it was on the writ of *habeas corpus* in this case. It was either you or Mr. Slonaker, with the Attorney General's Office, who told me about it.

Q I'd like to direct your attention to your closing argument in the sentencing phase of the trial. On page 601 of the transcript of April 17, would you take a look at the first paragraph of your closing argument?

(Transcript handed to the witness.)

A I've read that before today and again today.

Q Do you recall what it was you were talking about when you said, "What looks like three convictions, there's only one"?

A I certainly do.

Q What was that?

A Before the arguments were made, Mr. Kloch said to me there is, in effect, one conviction for 21 instead of three, or what appears to be three, and that has to do with breaking and entering and larceny and something of that nature. When he indicated that to me, he indicated he would clear it up with the jury. And I looked again at the transcript and nothing is mentioned in there. When I got up, [72] the first thing I did was mention the fact that he had neglected to clear that up with them.

Q All right.

I want you to look at these records of conviction again that come from Exhibit 21. The first two, A and B, being the breaking and entering and larceny. Are those what you're referring to in that first paragraph?

A That's exactly right.

Q On document A, there appears to be two charges, and document B there is one, and you didn't want the jury to know there were three?

A There was no question that if he had not said anything to me I would not have known anything differently other than the two, what appears to be the two different charges. That's what was talked about.

Q Let me direct your attention to the next page of the transcript, 602.

A I've looked at that before today and today again myself.

Q And when you told the jury, and I'm quoting, "from '63 or '64 there were a number of misdemeanors," were you including the affray with a deadly weapon, the assault on the police officer, and the other affray, with a deadly [73] weapon?

A What I was talking about, Mr. Shapiro, was whatever was left from 19, 20, and 21. There was no specific reference to either 19 or 20, or what was left in 21; it was just whatever was left.

MR. SHAPIRO: Court's indulgence for a moment.

BY MR. SHAPIRO:

Q You represented Mr. Evans, did you not, in his appeal to the Supreme Court of Virginia, his petition for writ of certiorari to the United States Supreme Court?

A That's correct.

Q I know you're familiar with those documents (indicating).

A I read them again this morning.

Q And in there, the Commonwealth listed, did it not, what turned out to be these invalid convictions?

A It listed not only in the petition for—Well, not petition, but their brief in the Virginia Supreme Court, but in their opposition to our petition for a writ of certiorari or petition for certiorari from the Supreme Court of the United States. And in the same print, the same chronological information was used in the opinion of the Supreme Court of Virginia.

[74] Q If you had known that there was any problem with that recitation of prior convictions, would you have taken any action?

A Well, if I had known that—and I'm assuming what you're referring to is the fact that the assault or the affray with the police officer and the other assault were merged into one on appeal, which indicated a four-month jail sentence. First of all, I don't think I would have, number one, let it go by on the appeal in my brief. Secondly, when I received the brief from the Attorney General's Office, I don't believe I would have not made some comment to it. And, thirdly, if I had known about it before, I don't think I would not have made any comment when I got the opposition to my petition for writ of certiorari.

Q One more question just to be clear. Did Mr. Kloch or Mr. Sengel say to you at trial, or during the sentencing phase, in fact, the assault on a police officer and the affray were really appealed and embodied in this document?

A Mr. Shapiro, I have searched that in my mind and tried to determine, from my own independent recollection, what Mr. Kloch stated to me. And what Mr. Kloch stated to me had reference to the larceny charges. If he had said to me that those assaults, particularly the one on a police [75] officer, were, in effect, only one charge, there is one place we would have gone and that is we would have gone very quickly and cleared it up at the bench. That was never said.

In addition to that, if that was embodied in what he told me, then he either would have said something to the

jury and I can assure you if he didn't I would have said something to the jury. And I certainly wouldn't have referred to something as just two items being one.

MR. SHAPIRO: No further questions, Your Honor.

* * * *

[83] BLAIR BROWN

was called as a witness by and on behalf of the defendant, and, after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SHAPIRO:

Q Good morning, Mr. Brown. Would you state your name for the record, please?

A Blair Brown.

Q How are you employed?

A Self-employed attorney.

Q For how long have you been practicing law?

A Little over six years.

Q And prior to that?

A I was a Deputy Clerk in the Circuit Court in Alexandria.

Q You defended Mr. Evans along with Stefan Long?

A Yes, sir.

Q And were you present throughout the entire trial, including the sentencing phase?

A Yes. There may have been times when I was in the hall doing one thing or another, but it all—the stages [84] when there was anything going on, yes, I was here.

Q All right.

I want to direct your attention to the records of conviction which were contained in Commonwealth's Exhibit 21 of that trial. You're familiar with these, are you not?

(Documents handed to the witness.)

A Yes.

Q Did anyone ever tell you, during the course of these proceedings, that this purported conviction for assaulting a police officer had been nol-prossed on appeal?

A No.

Q Or that this purported conviction for an affray with a deadly weapon was, in fact, the same as this additional conviction for assault or an affray with a deadly weapon on appeal?

A No.

Q Had you known that, would you have taken any action?

A I would have vigorously objected to the admissibility of all but those which were, in fact, convictions, that last one.

Q Why was that?

A Because the statute under the sentencing phase clearly says you're only entitled to records of conviction to [85] be entered on the basis on which the Commonwealth is proceeding in the case.

Q Even if the statute allowed things other than convictions, if you knew that those were not, in fact, convictions, would you, in fact, have taken any action?

A That's sort of a non sequitur. It does, so I don't know if I would. I would have objected strenuously under any circumstances I could think of.

Q When did you first find out there was the problem that I just described to you with these records of conviction we have been discussing?

A When you told me significantly after the trial.

MR. SHAPIRO: No further questions.

* * * *

[117] JONATHAN SHAPIRO,

was called as a witness by and on behalf of the defendant, and, after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LABOWITZ:

Q State your name and how it is you're employed.

A John Shapiro, I'm an attorney.

Q And what is your relationship to Wilbert Evans, the defendant in this case?

A I represented Mr. Evans on his *habeas corpus* petition since April of 1982.

Q And with regard to the *habeas* petition, the allegations that are being made with regard to it, issue one in the opposition to the prosecution's motion for re-sentencing, when were those specific allegations made in terms of when you filed the *habeas corpus* petition?

A I have not reviewed the various petitions. I have them with me. The initial petition was prepared hurriedly and did not include everything. We sought leave of the court to amend and leave of court was granted. We amended the petition for writ of *habeas corpus*. It was, I [118] believe, in that amended petition for writ of *habeas corpus* that the problems, as I have referred to them, with those convictions were set out. There was additionally a second amended petition and, if I recall correctly, the second amended petition set forth that there were additional problems concerning the lack of counsel for some of these predicate offenses, and it also clarified some of the other things we had previously alleged. I don't know the dates of these various amended petitions, but they're in the record and they were fairly early on in the litigation, I believe.

Q In terms of the *habeas corpus* petitions you filed on behalf of Mr. Evans, who responded on behalf of the Commonwealth?

A Mr. Slonaker.

Q What position did you understand Mr. Slonaker to hold at that time?

A Assistant Attorney General.

Q Did you have occasion to have a conversation with Mr. Slonaker, face-to-face or over the telephone, during the pendency of the various *habeas corpus* petitions?

A Mr. Slonaker and I had numerous conversations. I was quite convinced we would succeed in our efforts to have Mr. Evans' death penalty set aside, and I was interested in [119] checking continually the progress, if any, in the Attorney General's Office along those lines. Mr. Slonaker indicated to me from early on in the litigation that the Commonwealth's case was a difficult one, and that gave me some hope. And, for that reason, I called him periodically to check on the progress to see if the Commonwealth had finally concluded that it must confess error.

Q Do you have a recollection of specific dates of when you and Mr. Slonaker had conversations?

A I have recollection of two specific dates. I've gone through my telephone records, which I have with me, and they indicate numerous calls to the Attorney General's Office from April 15th, 1982 all the way to where I stopped counting on March 28th, 1983. But the only specific conversations that I can attribute specific dates were two: The first being on February 22nd, 1983; and the second being on March 28th, 1983.

Q Before we get to those, had you had discussions with Mr. Slonaker with regard to the substance of the allegations made in the *habeas corpus* petitions?

A Yes.

Q And had you discussed any further—Had you and Mr. Slonaker discussed anything that would, that he felt [120] ought to be provided as a supplement to those petitions?

A When I spoke to Mr.—to Jerry, our conversations dealt with two points of the petition, the point concerning the lack of counsel for some of these and other offenses, and the point concerning what we have labelled C, D, and E. Mr. Slonaker asked me to send to him what proof I had and I was quite happy to do that, because I thought

it would facilitate an agreement in the case. I sent him what I had collected, which was a notation on the record in North Carolina prepared by the court indicating what had really happened with offenses C, D, and E. Later, Mr. Slonaker asked me to provide him with any information I had concerning whether or not Evans had counsel for his prior offenses. In order to do that, I wrote to the Clerk of Court in Wake County, North Carolina, and asked him to let me know, after an examination of his records, whether Evans did have counsel for the offenses which I listed in my letter. The offenses listed were the seven the Commonwealth had used in order to obtain the death sentence.

Q Did you convey the information you received from North Carolina to Mr. Slonaker?

A I'm certain I did. And, in addition, the Clerk of North Carolina corresponded directly with Mr. Slonaker. I [121] have a copy of a letter dated January 19th, 1983 to Mr. Slonaker from J. Russell Nipper (phonetic), the Clerk of the Superior Court. And in that letter he was actually responding to a previous letter of mine to him; he pointed out the history of offenses C, D, and E. This letter was sent to Mr. Slonaker on January 19th, 1983, by Mr. Nipper.

Q Did Mr. Slonaker indicate to you he received such a letter from Mr. Nipper?

A In a conversation—To the best of my recollection, we spoke about that on February 22nd. February 22nd was a day on which I called Mr. Slonaker to see what, if any, progress there was in the case. Mr. Slonaker informed me that, off the record, the Commonwealth would most likely be conceding error, but that he needed approval from his superiors and he was preparing a memorandum. Does that answer your question, or did I miss something?

Q Did he specifically acknowledge receiving the letter from Mr. Nipper or the information Mr. Nipper's letter contained?

A I can't recall whether he specifically acknowledged receiving Mr. Nipper's letter, but we did talk about—I can only conclude he must have, because we [122] talked about the contents of Mr. Nipper's letter. And Mr. Slonaker indicated that he wanted—that he, too, had spoken to Mr. Nipper or someone down there, that the records were in disarray in North Carolina, and he wanted an affidavit from Mr. Nipper attesting to the facts which were contained in Mr. Nipper's letter.

Q At this point, February 22nd, 1983, had you any knowledge of what has been discussed as S-12 pending then in the Virginia Legislature?

THE COURT: SB-12.

THE WITNESS: I was not.

BY MR. LABOWITZ:

Q What was your understanding to what the state of the law was with regard to the Commonwealth's right upon re-sentencing in a death penalty case?

A My understanding from a reading of Patterson and from a review of the law itself of that, if the death sentence were set aside for any reason by the Supreme Court, that the court would then impose a life sentence; that was its only option.

Q Did Mr. Slonaker discuss at any point the progress of Senate Bill 12 through the Legislature?

A I didn't hear anything on Senate Bill 12 until the [123] end of March.

Q What occasioned that?

A On March 28th, I made a phone call to Mr. Slonaker again and it was in that conversation that Mr. Slonaker indicated to me, in an on-the-record form, that the Commonwealth would be conceding error, that he would be writing the letter to Judge Wright, and it would be sending a proposed order for me to sign. It was at that time that I first began to understand that the death penalty had been amended. Because Mr. Slonaker indicated to me that from this point on whatever happened in the case

would be up to John Kloch and he might seek re-sentencing if he were inclined to do that. I asked him how he could do that, because my understanding under Patterson was that could not be done, and I was told about the new legislation.

Q What legislation was that?

A The legislation amending the penalty statute to allow for re-sentencing in the event a death sentence was set aside.

Q Did you subsequently become aware as to when that bill became law?

A It was signed into law on the 28th of March, the date we had that conversation.

[124] Q Do you know when it became official?

A The 28th of March. It was emergency legislation.

Q At any time did Mr. Slonaker make you aware of the pendency of Senate Bill 12 and the pending change in the statute?

A No.

Q And subsequently, did they, in fact, move to vacate the death penalty?

A Subsequently, as he promised to do, Mr. Slonaker wrote a letter to John Kloch, which is in the file, I think it's dated the 16th of April, proposing to concede error.

MR. LABOWITZ: That would be all the questions for the defendant, Your Honor.

THE COURT: All right.

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THE RICHMOND NEWS LEADER

Monday, June 4, 1984

GUARDS, WHO FEARED FOR LIVES, RESENT CRITICISM

SOUTH HILL—"They picked me up by my arms and legs. I thought they were going to bash my brains out against the wall and I started to pray, 'Lord have mercy . . .'

"Instead they crammed my body between the death row cells amongst the plumbing fixtures. They shut the chase door and I could only hear what was coming down."

Those were the recollections of one of the 14 employees of the Mecklenburg Correctional Center who were taken hostage Thursday night during an escape by six death row inmates.

Two of the escapees have been recaptured—but four, including convicted murders James D. and Linwood E. Briley of Richmond, remained at large today.

The correctional center employee and two other guards agreed to an interview with The Richmond News Leader if their identities were kept secret.

The men said they had been cautioned against talking to reporters and were afraid they would lose their jobs if they were identified. The three fear their jobs are in jeopardy anyway.

But they said all of the hostages are angry about statements that have been made about them by state corrections officials.

Recalling events during the 90 minutes that 14 employees were held hostage, a guard said the escaping inmates "shut me behind the door after holding a knife to

my throat and other parts of my body. They threatened to kill me . . .

"The higher-ups can say all they want to about this, but it isn't the guards' fault," he said. "The fault should go to the ones in charge of the institution. We just work here and we don't have enough help. It would be different if it had been their throat."

All employees taken hostage during the escape have been placed on paid leave during the investigation. The guards said 12 male correctional officers and two female nurses were taken hostage. Most were bound and blindfolded and put in different places within the prison facility. They were bound with bandages, torn sheets and ropes.

The guard said someone would have been harmed if two death row inmates who did not escape with the others had not intervened. There were 23 inmates on death row Thursday night. A 24th inmate reportedly was away for a court hearing.

The guard said inmates Wilbert Lee Evans and Willie Lloyd Turner repeatedly cautioned the escaping inmates that they had promised there would be no bloodshed. Evans and Turner reportedly also were responsible for the nurses not being badly mistreated.

"Evans and Turner kept yelling down to where they (the escaping inmates) had the nurses, saying, 'Ma'am, are you all right? Nurse . . . are you all right?' They pleaded with the escapees to leave them alone."

The guard said, "If I am ever allowed to go back on death row, I intend to thank those men. It was the funniest thing I have ever seen in a way. What I mean is, I don't understand why all of them didn't run.

"I do know I owe my life, as do all the others, to Evans and Turner. If I had the money, I would hire an attorney for them and see if they couldn't be set free.

Maybe they have been changed. They (the escaping inmates) would have killed every damn one of us. After this, I know there's a God and he loves me." [Emphasis supplied.]

* * * *

THE WASHINGTON POST B8

Wednesday, July 4, 1984

NURSE HELD HOSTAGE DURING ESCAPE SAYS SHE FEELS LUCKY—AND AFRAID

CLARKSVILLE, Va., July 3 (AP)—A prison nurse who was sexually molested during the escape of six death row inmates from the Mecklenburg Correctional Center said she had thought about quitting her job many times before the May 31 breakout because she didn't feel safe.

"I worked about a year before the security began to decrease," said Ethel Barksdale, who was hired at the maximum security prison near Boydton, Va., in December 1981.

"We started to have less protection . . . About six or eight months after I went to work there, an inmate tried to stab me with a fountain pen, but he missed," Barsdale told the Richmond News Leader in a copyright story. "There was another incident where I was slapped in the face by an inmate.

"The job was getting too stressful for me. "I had thought many times about leaving, but . . . I have to support myself." She is on leave, while deciding whether to return to her job.

Sitting in her one-bedroom mobile home Sunday, dressed in a sundress and clutching a tiny stuffed koala bear, the 26-year-old woman spoke quietly about the two-hour ordeal she says "changed my life altogether."

"I don't feel like a whole person," she said. "I am really afraid of men now—any man . . . I have kept it all inside of me, and I haven't cried very much. I had nightmares about it at first, but the medication helped.

"I have just started staying alone again for the last two weeks. At night, I still wake up, and if I hear a dog or something, I'm so afraid that there will be someone lurking."

Barksdale was one of 14 prison employees taken hostage in the largest death row escape in U.S. history.

She said she was making her rounds dispensing medicine to the inmates when she walked into death row, where the inmates were already holding several guards captive.

"I could see the officers lined up on the floor face down and tied up," she said. "I started thinking about my mother and my family. I was just crying and praying. They told me to be quiet because they didn't want anybody to hear me."

Earl Clanton, one of the escapees, ordered her to strip. Barksdale said she took off all her clothes except her underwear.

"He came back and said, 'Miss, did you hear me? I said you have 20 seconds to take all your clothes off,'" she said, "I was so scared and humiliated."

She said she got help from inmate Wilbert Lee Evans, a death row convict who did not escape and whom prison officials have credited with saving the lives of the hostages.

"Evans asked [Canton] to give me a blanket to cover myself with and he did," Barksdale said. "But as soon as Evans left the cell, Clanton tied my hands and feet and made me lie down on the bed. I was begging him to leave me alone, but he started to molest me with his hands."

Clanton left and Linwood Briley came in. Both men touched her several times, but Barksdale said she wasn't raped. " I think that the only thing that saved me was time.

"They kept rushing around trying to get out. *Evans kept asking me if I was all right,* and [inmate Willie Lloyd] Turner untied me and let me go after it was over."

More than a month after the ordeal, Barksdale said she is still confused and emotionally battered—but she is also alive. "I thought that night that I'd never set my feet on ground again. Somehow, some way I have made it through. I am so lucky." [Emphasis supplied.]

(3)

No. 84-1224

In The

Supreme Court of the United States

October Term 1984

WILBERT LEE EVANS,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

RESPONDENT'S BRIEF IN OPPOSITION

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33 pp

QUESTIONS PRESENTED

I. Does the resentencing of the petitioner to death, pursuant to a statute which became effective after petitioner's first sentencing proceeding but before his original death sentence was set aside and his resentencing proceeding commenced, constitute an *ex post facto* violation?

II. Does the resentencing of the petitioner to death violate the Equal Protection Clause?

III. Does a ruling by the Supreme Court of Virginia that a particular jury instruction accurately reflected Virginia law present a federal question?

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RESPONDENT'S BRIEF IN OPPOSITION

JURISDICTION

The petitioner asserts that the jurisdiction of this Court is grounded upon 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions involved are set forth in the Petition for Writ of Certiorari at 2-3. Sections 17-110.1 and 19.2-264.4, Code of Virginia, are set forth in their entirety in the appendix to this brief in opposition at A. 1-4.

PRELIMINARY STATEMENT

References to the Petition for Writ of Certiorari will be designated, "(Ptn.____)." References to the appendix of

the Petition for Writ of Certiorari will be designated, "(App____)." And references to the appendix to this brief in opposition will be designated, "(A.____)."

STATEMENT OF THE CASE

On April 17, 1981, a jury in the Circuit Court of the City of Alexandria convicted the petitioner, Wilbert Lee Evans, of capital murder. After a separate hearing on the issue of punishment, the same jury recommended the death penalty. On June 1, 1981, the Circuit Court imposed the death penalty in accordance with the jury verdict. The conviction and death sentence were affirmed by the Supreme Court of Virginia on December 4, 1981. *Evans* v. *Commonwealth,* 222 Va. 766, 284 S.E.2d 816 (1981). This Court denied a petition for a writ of certiorari on March 22, 1982. 455 U.S. 1038 (1982).

Petitioner initiated state habeas corpus proceedings in April 1982. He amended his habeas petition on two occasions, the second in early January 1983. The Commonwealth confessed error in the petitioner's sentencing proceeding on April 12, 1983. On May 2, 1983, the Circuit Court of the City of Alexandria entered an order setting aside Evans' death sentence. On September 21, 1983, the Circuit Court conducted an evidentiary hearing to determine whether Evans should be resentenced or his sentence reduced to a life term. By an order dated October 12, 1983, the Circuit Court directed that Evans be resentenced.

On January 30, 1984, the Circuit Court impanelled a new jury for a resentencing hearing, and at the conclusion of that proceeding the jury recommended the death penalty. On March 7, 1984, the Circuit Court imposed the death penalty in accordance with the jury verdict. The Supreme Court of Virginia affirmed Evans' death sentence on November 30, 1984. *Evans* v. *Commonwealth,* ____ Va. ____, 323 S.E.2d 114 (1984). (App. la-15a).

STATEMENT OF FACTS

On January 27, 1981, the petitioner, a prisoner, fatally shot a deputy sheriff who was escorting him to jail in Alexandria. Evans had pretended to be a willing witness for the Commonwealth, but his sole purpose in cooperating with the authorities had been to engineer an escape after being brought to Virginia in custody from North Carolina. He planned to kill anyone who attempted to prevent his escape and he acted on this intent when he killed the victim. (App. 14a). The evidence at the resentencing hearing revealed that Evans had a prior history of criminal convictions in the District of Columbia and North Carolina. (App. 14a). The jury's imposition of the death penalty was based upon a finding of the petitioner's "future dangerousness."[1] *See* § 19.2-264.2, Code of Virginia.

REASONS FOR DENYING THE WRIT

I.

Resentencing the Petitioner to Death Pursuant to a Procedural Statute Which Was in Effect at the Time Petitioner's Original Death Sentence Was Set Aside and His Resentencing Proceeding Commenced Did Not Constitute an Ex Post Facto Violation.

At the time of petitioner's offense, and at the time of his first sentencing proceeding, § 19.2-264.3, Code of Virginia, provided that in a capital murder jury trial the sentencing proceeding must be conducted before the same jury which determined the defendant's guilt. The Supreme Court of

[1] Evans' references to events outside the record which occurred after the jury made its finding (Ptn. 8 n. 10, 17 n. 24; App. 75a-80a) are not only inappropriate, they are also irrevelant to the issues raised in the petition.

Virginia announced such an interpretation of § 19.2-264.3 in *Patterson* v. *Commonwealth,* 222 Va. 653, 283 S.E.2d 212 (1981). At the time Evans' original death sentence was vacated, however, and at the time of his resentencing proceeding, § 19.2-264.3 had been amended to provide that if a death sentence were "set aside or found invalid," a resentencing proceeding could be held before "a different jury" than the one which had determined the defendant's guilt. (Ptn. 2-3). Petitioner contends that the application of the amended version of § 19.2-264.3 to his case constituted an *ex post facto* violation.

Central to Evans' *ex post facto* claim are his assertions that he ". . . was entitled, upon the setting aside of his death sentence, to a sentence of life," and that, if the trial errors which invalidated his first death sentence had been brought to the attention of the Virginia Supreme Court at the time of his first appeal, that Court ". . . would have done precisely what it had done in *Patterson* . . . and commuted his sentence to life." (Ptn. 10; *see also* Ptn. 13-14). These assertions concerning the effect which *Patterson* would have had upon his case, however, are the very same contentions which the Supreme Court of Virginia has already rejected. In its analysis of petitioner's *ex post facto* claim that Court stated:

> Defendant *contends* that application of the revised sentencing law to him violates the prohibition against *ex post facto* laws. . . . Evans says [that] under the law as it existed at the time he committed his offense, at the time he was tried, at the time his first conviction was affirmed, and at all times before approval of the emergency legislation, he was entitled to a sentence of life imprisonment upon the setting aside of his death sentence. He argues that as the result of *Patterson*: "Automatic commutation in such situations thus *became a part of Virginia's law* just as surely as if it had been drafted by the legislature."
>
> Evans *contends* that had the errors which led to the Commonwealth's confession of error been brought to our attention at the time of his first appeal, we would have done in *Evans* what we had done . . . previously in *Patterson*, and Evans would have received a life sentence. He *contends* the considerations which led the Court to commute Patterson's sentence . . . applied with full force to Evans' case. . . . *We reject defendant's contentions* and conclude that there has been no *ex post facto* violation.

(App. 4a-5a, emphasis added).

While it is clear that an *ex post facto* claim raises a federal question, it is equally clear that Evans' claim is premised upon his interpretation of Virginia law—an interpretation which has been unequivocally rejected by the Supreme Court of Virginia. It is beyond dispute that the Virginia Supreme Court is the final arbiter of Virginia law, and thus the final arbiter of how the *Patterson* case and the former version of § 19.2-264.3 would have affected petitioner's case. An interpretation of state law by that state's highest appellate court is binding on this Court. *Garner* v. *Louisiana*, 368 U.S. 157, 166 (1961).

Evans' claim that he has been ". . . deprived . . . of the substantial right . . . to have the same jury which heard the facts of his trial decide his fate" (Ptn. 11) is not properly before this Court. Not only did Evans fail to present this claim to the Supreme Court of Virginia, the claim is also directly opposed to what he argued below. (*See* petitioner's "Questions Presented" in the court below at A. 5-7). In his appeal to the Supreme Court of Virginia, petitioner argued, just as he has argued elsewhere in his petition, not that he was entitled to be sentenced by the

same jury which had determined his guilt, but that a resentencing proceeding was barred and that he was entitled to a life sentence. Since the particular claim which Evans now seeks to raise has never been presented to the Virginia Supreme Court, it cannot be properly raised for the first time in this Court.[2] *See Beck* v. *Washington*, 369 U.S. 541, 553-54 (1962).

The Supreme Court of Virginia correctly applied *Weaver* v. *Graham*, 450 U.S. 24 (1981), and *Dobbert* v. *Florida*, 432 U.S. 282 (1977), in rejecting Evans' *ex post facto* claim. In *Weaver*, this Court held: "Critical to relief under the *Ex Post Facto* Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment *beyond what was prescribed when the crime was committed*." 450 U.S. at 30 (emphasis added). And in *Dobbert*, this Court recognized that the proper focus of an *ex post facto* analysis is "the quantum of punishment attached to the crime" at the time of the offense. 432 U.S. at 294. Since at the time of his offense Evans had "fair warning," *Dobbert*, 432 U.S. at 297, that the particular type of murder he committed was punishable by death, the Supreme Court of Virginia correctly concluded that he had suffered no *ex post facto* violation.

Petitioner's only attempt to distinguish his case from *Weaver* and *Dobbert* is to reiterate his assertion that he was entitled to a life sentence when his first death sentence was set aside. For example, in attempting to distinguish *Dobbert*, Evans asserts that ". . . it can be said with *absolute* assurance that had Respondent disclosed to the Virginia Supreme

[2] For this same reason, Evans' suggestion that the change in the law in this case ". . . should be considered a bill of attainder" (Ptn. 13 n. 17) is not a matter that is properly before this Court.

Court the errors in Evans' case, Evans would have received a life sentence under the old statute." (Ptn. 13, emphasis in original). As noted previously, however, petitioner's contentions concerning the effect that the prior Virginia law would have had on his case have been categorically rejected by the final arbiter of Virginia law, the Virginia Supreme Court.

This case cannot be distinguished from *Dobbert* in any meaningful way.[3] In *Dobbert*, a defendant, who had been sentenced to death by the trial judge despite the jury's recommendation of a life sentence, argued that a change in Florida law had deprived him of "a substantial right to have the jury determine, without review by the trial judge, whether the death penalty should be imposed." 432 U.S. at 292. This Court rejected that argument and ruled that such a "change in the role of the judge and jury in the imposition of the death sentence" was merely procedural, and therefore applying the new law to Dobbert did not constitute an *ex post facto* violation. *Id.* As in *Dobbert*, the change in the law in petitioner's case was merely procedural in that its only effect was to alter the procedures surrounding the imposition of the death penalty and did not increase the "quantum of punishment" attached to Evans' crime. At the time of petitioner's offense, and at the time of his resentencing proceeding, the crime which he committed carried only two possible punishments—a life sentence or a death sentence.[4]

The Virginia Supreme Court also held that the statutory

[3] *See Jordan* v. *Watkins*, 681 F.2d 1067, 1079, *reh'g denied*, 688 F.2d 395 (5th Cir. 1982); *Knapp* v. *Cardwell*, 667 F.2d 1253, 1262-63 (9th Cir.), *cert. denied*, 459 U.S. 1055 (1982).

[4] For this reason, Evans' reliance on *Lindsey* v. *Washington*, 301 U.S. 397 (1937), (Ptn. 14), is misplaced. *See Dobbert*, 432 U.S. at 300.

amendment in this case was ameliorative.[5] The Court found that "[w]here . . . there has been a judicial determination that a sentence to death is invalid because of error during the penalty stage, the new law provides for impanelling a new jury, free of any taint from errors during the first trial, to redetermine the defendant's punishment." (App. 7a). While acknowledging that a defendant who has been convicted of capital murder has the right to a fair and impartial sentencing proceeding, the Court ruled that a defendant, such as Evans, ". . . will not be heard to complain that a change in the law which protects that right is not wholly beneficial to him." (App. 7a). While petitioner contends that the new law, as applied to him, is more onerous than the old, that contention is based upon his misapprehension of his rights under the old law, *i.e.*, that he was entitled to a life sentence upon the setting aside of his original death sentence. As noted previously, the Virginia Supreme Court, as the final arbiter of Virginia law, has interpreted that law in a manner which fatally undermines Evans' contention.

II.

Resentencing the Petitioner to Death Did Not Violate The Equal Protection Clause.

The essence of petitioner's equal protection claim is his allegation that he and the defendant in *Patterson* v. *Commonwealth,* 222 Va. 653, 283 S.E.2d 212 (1981), were "similarly situated," and yet, the Virginia Supreme Court commuted Patterson's death sentence to a life sentence while it affirmed the reimposition of petitioner's death

[5] As this Court made clear in *Dobbert*, findings that a change in the law is procedural or ameliorative are "independent bases" for a conclusion that there has been no *ex post facto* violation. 432 U.S. at 292 n. 6.

sentence. Central to this claim, just as it was to his *ex post facto* claim, is Evans' contention that if ". . . the Virginia Supreme Court [had] been alerted to the flaws in Evans' [first] sentencing proceeding, there is no doubt that his sentence would have been vacated and reduced to life [at the time of his first appeal]." (Ptn. 20). As noted previously, however, this contention has been rejected by the Virginia Supreme Court. (App. 4a-5a). This interpretation of Virginia law by Virginia's highest appellate court is binding on this Court. *See Garner* v. *Louisiana,* 368 U.S 157, 166 (1961).

Although the petitioner has not raised this matter as a separate claim in this Court, he alleges in his petition that the respondent purposefully delayed the resolution of his habeas corpus proceedings so that his original death sentence would not be set aside until after the statutory amendment became effective.[6] (Ptn. 5-6, 18). This allegation, however, ignores the facts that the trial court conducted an evidentiary hearing on this matter, that the trial court made a specific finding of fact that there had been no purposeful delay by the respondent, and that the Virginia Supreme Court held that the trial court's finding was supported by ". . . credible, uncontradicted, and persuasive" evidence, as

[6] Petitioner's assertion that "[t]he Assistant Attorney General who was handling Evans' habeas petition . . . was the same Assistant who had the responsibility in the Attorney General's office of accomplishing the task of securing on an emergency basis legislative enactment of the amendments to the death penalty laws" (Ptn. 6 n. 6) is contradicted by the unrebutted evidence presented at the state evidentiary hearing. (A. 8-12). Evans' assertion that the Commonwealth, at the time of his first appeal, presented to the Virginia Supreme Court, and to this Court, evidence which the Commonwealth ". . . knew to be false" (Ptn. 10), is also entirely without support in the record. The unrebutted evidence demonstrated that the Assistant Attorney General who handled Evans' first appeal was unaware of the error concerning petitioner's original death sentence until after petitioner initiated his habeas corpus proceedings. (A. 12).

well as the Court's own review of the government files which had been inspected by the trial court *in camera.*[7] (App. 9a-10a). Clearly, it is not the function of a writ of certiorari to review findings of fact made by a state trial court after a full and fair evidentiary hearing. *See Wainwright* v. *Witt,* ___ U.S. ___, 53 U.S.L.W. 4108, 4112-13 (January 21, 1985) (recognizing the deference to which a trial court's findings of fact are entitled even on direct review).

The Supreme Court of Virginia, as the final arbiter of Virginia law, found that the statutory change involved in this case ". . . affects only the procedure to be followed if a death sentence is set aside. . . ." (App. 13a). This being so, the Court held that it is ". . . rational to classify individuals potentially affected by the change according to the time when the individual's death sentence was set aside, and the resentencing proceeding commenced, rather than at the time when the person was originally tried and convicted."[8] (App. 13a-14a). To hold otherwise, the Court concluded, would lead to anomalous results. For instance, the position advanced by Evans would mean that a purely

[7] Likewise, Evans' allegation concerning prosecutorial misconduct at his first sentencing proceeding (Ptn. 7) ignores the fact that at the conclusion of the evidentiary hearing on the matter the trial court made a finding of fact that the prosecution had not engaged in misconduct which would bar a resentencing proceeding. On appeal, the Virginia Supreme Court ruled that ". . . credible evidence supports the trial court's finding of fact. . . ." (App. 8a). Furthermore, the Court also correctly decided that even if, *arguendo,* it were assumed that the prosecution had been guilty of serious misconduct, under *United States* v. *Morrison,* 449 U.S. 361 (1981), Evans was entitled only to the fair and impartial resentencing proceeding which, in fact, he had received. (App. 8a).

[8] The Virginia Supreme Court correctly applied the "rational basis" test rather than the "strict scrutiny" test which would be applicable to a suspect classification. (App. 13a). Evans does not contend that the Court applied the wrong standard.

procedural statute could not be applied to a defendant whose death sentence was not set aside until many years after the statute had become effective. (App. 13a).

The Virginia Supreme Court correctly found that the petitioner and the defendant in *Patterson* were ". . . not similarly situated . . . with respect to the amendment to the death penalty statutes." (App. 13a). Evans' death sentence, unlike Patterson's, was not set aside until after the statutory change had become effective. Since, as the Virginia Supreme Court has found, the purpose of the statutory change in this case was merely to regulate the procedure to be followed in the event a death sentence is set aside, applying the law which was in effect at the time Evans' death sentence was set aside and at the time his resentencing proceeding commenced, cannot be termed "irrational." *See Vance* v. *Bradley,* 440 U.S. 93, 97 (1979).

In *Dobbert* v. *Florida,* 432 U.S. 282 (1977), this Court recognized that in regulating its system of criminal procedure a state, consistently with the Equal Protection Clause, may draw the line at some point between those individuals whose cases have progressed sufficiently far in the legal process to be governed by the old law and those individuals whose cases involve acts which properly subject them to the amended law. 432 U.S. at 301. In the case at bar, Virginia has drawn the line so that the amended statute shall apply to all cases where the defendant's death sentence was set aside and his resentencing proceeding commenced after the effective date of the amendment.

Evans attempts to distinguish *Dobbert* by emphasizing that in that case this Court found nothing irrational about applying an amended statute to a defendant ". . . since the new statute was in effect at the time of his trial and sentence." 432 U.S. at 301. He points out that, unlike the

situation in *Dobbert,* the amended statute which was applied to him did not become effective until ". . . two years after his trial [the guilt stage]." (Ptn. 18). This, however, is a distinction without equal protection implications. This Court's recognition in *Dobbert* that the new law was in effect at the time of the defendant's trial has no special significance to Evans' case. Dobbert's death sentence, unlike petitioner's, had never been set aside, and his trial on the issue of guilt, unlike petitioner's, had occurred at the same point in the criminal process as his sentencing proceeding. The only reason that the time of the defendant's trial, as opposed to the time of his sentencing, was significant in *Dobbert* was because the defendant had claimed that, simply because he had committed his offense at a time when Florida's death penalty statute was unconstitutional, he was similarly situated with other defendants whose trials had been conducted pursuant to the unconstitutional statute and who consequently had had their death sentences commuted to terms of life imprisonment. 432 U.S. at 301. In petitioner's case, on the other hand, at no time relevant to the case, neither at the time of his offense nor at the time of his first trial, was Virginia's death penalty statute ever unconstitutional.[9] Since the amended statute concerns only the procedure to be followed in the event a death sentence is set

[9] For this reason, two cases cited by Evans, *Commonwealth* v. *Story,* 440 A.2d 488 (Pa. 1981), and *Lee* v. *State,* 340 So.2d 474 (Fla. 1976), are clearly distinguishable. Both cases, as Evans concedes (Ptn. 15), involved a defendant who was initially tried and convicted pursuant to a statute which was later declared to be unconstitutional. This fact distinguishes those cases from *Dobbert,* as well as the petitioner's case. *Story* is also distinguishable because the result in that case was based upon a finding by the Supreme Court of Pennsylvania that the state legislature ". . . did not intend [the particular statute in question] to apply to an offense committed prior to its effective date." *Commonwealth* v. *Crenshaw,* 470 A.2d 451, 454 (Pa. 1983).

aside, it was entirely consistent with *Dobbert* to apply to Evans the law which was in effect at the time his death sentence was set aside and at the time of his resentencing proceeding.

III.

The Virginia Supreme Court's Ruling That a Particular Jury Instruction Accurately Reflected Virginia Law Does Not Present a Federal Question.

A short time after retiring to deliberate at Evans' resentencing proceeding, the jury sent the trial judge the following question:

> The decision must be unanimous for death, must the decision also be unanimous for life, or does a split decision automatically become life?

In response to the jury's question the trial judge instructed the jury that its verdict "must be unanimous as to either life imprisonment or death."

On appeal, Evans contended that the trial court erred by instructing the jury that a verdict for a life sentence must be unanimous. (App. 11a). His contention was based, as it is now, on his interpretation of § 19.2-264.4(D), Code of Virginia. The Virginia Supreme Court, however, rejected the contention. The Court first noted that "[u]nder established Virginia law, the verdict in all criminal prosecutions must be unanimous," and then stated that it ". . . percieve[d] no legislative intention to change that rule by virtue of the language of Code § 19.2-264.4(D)." (App. 12a). The Court concluded that when § 19.2-264.4 is considered as a whole, including subsection (E) (*see* A. 4), Virginia law requires that the verdict of a capital sentencing jury be unanimous whether it be for a life sentence or a death sentence. (App. 12a).

Petitioner now argues that the Supreme Court of Virginia misread the intent of the Virginia legislature and misinterpreted Virginia law. (Ptn. 22). Such a claim, however, clearly does not raise a federal question and cannot be properly raised in a petition for a writ of certiorari. The Virginia Supreme Court is the final arbiter of Virginia law and its interpretation of a Virginia statute is binding on this Court. *See Garner* v. *Louisiana,* 368 U.S. 157, 166 (1961).

CONCLUSION

The merits of each of petitioner's claims have been carefully considered by the Supreme Court of Virginia. That Court correctly applied the precedents of this Court in rejecting those claims.

The claims raised by Evans either completely fail to present a federal question, or to the extent a federal question is presented, the claims are premised upon his misapprehension of Virginia law. Evans' contentions concerning the effect of Virginia law upon his case have been unequivocally rejected by Virginia's highest appellate court.

Contrary to Evans' assertion, the precise issues raised by this case are unlikely to recur. This case's rather unique chronology and set of facts, as set forth by the Supreme Court of Virginia (App. 1a-4a, 10a, 13a), indicate that this case will have little, if any, impact beyond its own factual limitations. There do not exist any special reasons

or circumstances for reviewing the decision in this case, and no new constitutional rule would be developed by any decision of this Court. For these reasons, the petition should be denied.

Respectfully submitted,

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APPENDIX TO
RESPONDENT'S BRIEF IN OPPOSITION

§ 17-110.1. Review of death sentence.—A. A sentence of death, upon the judgment thereon becoming final in the circuit court, shall be reviewed on the record by the Supreme Court.

B. The proceeding in the circuit court shall be transcribed as expeditiously as practicable, and the transcript filed forthwith upon transcription with the clerk of the circuit court, who shall, within ten days after receipt of the transcript, compile the record as provided in Rule 5:14 and transmit it to the Supreme Court.

C. In addition to consideration of any errors in the trial enumerated by appeal, the court shall consider and determine:

1. Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; and

2. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

D. In addition to the review and correction of errors in the trial of the case, with respect to review of the sentence of death, the court may:

1. Affirm the sentence of death;

2. Commute the sentence of death to imprisonment for life; or

3. Remand to the trial court for a new sentencing proceeding.

E. The Supreme Court may accumulate the records of all capital felony cases tried within such period of time as the court may determine. The court shall consider such records

as are available as a guide in determining whether the sentence imposed in the case under review is excessive. Such records as are accumulated shall be made available to the circuit courts.

F. Sentence review shall be in addition to appeals, if taken, and review and appeal may be consolidated. The defendant and the Commonwealth shall have the right to submit briefs within time limits imposed by the court, either by rule or order, and to present oral argument. (1977, c. 492; 1983, c. 519.)

§ **19.2-264.4. Sentence proceeding.**—A. Upon a finding that the defendant is guilty of an offense which may be punishable by death, a proceeding shall be held which shall be limited to a determination as to whether the defendant shall be sentenced to death or life imprisonment. In case of trial by jury, where a sentence of death is not recommended, the defendant shall be sentenced to imprisonment for life.

B. In cases of trial by jury, evidence may be presented as to any matter which the court deems relevant to sentence, except that reports under the provisions of § 19.2-299, or under any rule of court, shall not be admitted into evidence.

Evidence which may be admissible, subject to the rules of evidence governing admissibility, may include the circumstances surrounding the offense, the history and background of the defendant, and any other facts in mitigation of the offense. Facts in mitigation may include, but shall not be limited to, the following: (i) The defendant has no significant history of prior criminal activity, or (ii) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance or (iii) the victim was a participant in the defendant's conduct or consented to the act, or (iv) at the time of the commission

of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired; or (v) the age of the defendant at the time of the commission of the capital offense.

C. The penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim.

D. The verdict of the jury shall be in writing, and in one of the following forms:

(1) "We, the jury, on the issue joined, having found the defendant guilty of (here set out statutory language of the offense charged) and that (after consideration of his prior history that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society) or his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved (torture) (depravity of mind) (aggravated battery to the victim), and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

Signed ..... foreman"

or

(2) "We, the jury, on the issue joined, having found the defendant guilty of (here set out statutory language of the

offense charged) and having considered all of the evidence in aggravation and mitigation of such offense, fix his punishment at imprisonment for life.

Signed ..... foreman"

E. In the event the jury cannot agree as to the penalty, the court shall dismiss the jury, and impose a sentence of imprisonment for life. (1977, c. 492; 1980, c. 160.)

IN THE

Supreme Court of Virginia

AT RICHMOND

RECORD NO. 840474

WILBERT LEE EVANS,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF APPELLANT

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QUESTIONS PRESENTED

1. Did Appellant's Re-Sentencing Under A Statutory Scheme Enacted After His Original Trial And Sentence, Which Was Later Set Aside, Violate The Prohibitions Against *Ex Post Facto* Laws, Since, Under The Statutory Scheme In Place At The Time Of The Original Trial And Sentence, The Appellant Was Entitled To A Sentence Of Life Upon The Setting Aside Of His Death Sentence? *(Assignment of Error No. 4)*

2. Notwithstanding The Above, Did The Commonwealth's Purposeful Delay In Conceding Error In The Appellant's Original Sentencing Proceeding Until After The New Statutory Scheme Was Enacted Violate The Appellant's Due Process Rights? *(Assignment of Error No. 2)*

3. Did The Commonwealth's Knowing Use Of False Evidence To Obtain The Appellant's Original Sentence Of Death So Violate Fundamental Fairness And Due Process As To Bar A Subsequent Sentencing Proceeding? *(Assignment of Error No. 1)*

4. Was The Appellant's Re-Sentencing Barred By The Double Jeopardy Clauses Of The United States And Virginia Constitutions? *(Assignment of Error No. 3)*

5. Did The Trial Court's Jury Instruction In Response To The Jury's Question, That A Sentence Of Life Imprisonment Required A Unanimous Vote Violate Virginia Statutes And The Due Process Clause? *(Assignment of Error No. 5)*

6. Did Sentencing The Appellant To Death When All Others Similarly Situated With Respect To The Amend-

ed Death Penalty Statutes Received Life Sentences Deprive The Appellant Of Due Process And Equal Protection Under The Fourteenth Amendment To The United States Constitution And Deprive Him Of Fundamental Fairness? *(Assignment of Error No. 6)*

VIRGINIA:

IN THE CIRCUIT COURT FOR THE
CITY OF ALEXANDRIA

COMMONWEALTH OF VIRGINIA,

vs.

WILBERT LEE EVANS,

Defendant.

F-5105

Alexandria, Virginia
Wednesday, September 21, 1983

JERRY P. SLONAKER,
was called as a witness by and on behalf of the Commonwealth of Virginia, and, after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Kloch:

Q Would you please state your full name and your occupation and how long you have been employed by the Attorney General's Office.

A Jerry P. Slonaker, Assistant Attorney General. I've been employed as an Assistant Attorney General, Criminal Division, since July of 1975.

Q And you were the Assistant that handled the direct appeal and *habeas corpus* on the case we are dealing with today?

A That's correct.

Q Mr. Slonaker, I want to go over a couple of things that occurred during the pendency of this case, as well as what your involvement was in Senate Bill 12. You're familiar with Senate Bill 12?

A Yes, I am.

Q Could you give the Court, please, a history in terms of your involvement, if any, in Senate Bill 12?

A Senate Bill 12 was essentially drafted a year before it was introduced. It was drafted by Jim Kulp of our office. For reasons unknown to me, it was not introduced or, if it was introduced, it never got out of committee.

Q In the '82 session?

A That's correct.

Subsequently, not too long before the memorandum which I prepared on September 9th, the Deputy Attorney General in charge of the Criminal Division came to me and Jim Kulp and indicated to us he was interested in having this bill introduced and he wanted Jim Kulp and I to prepare a memorandum explaining the purpose of the bill and outlining the various reasons why it should be introduced.

Q And was that done?

A It was done, that's correct.

Q All right.

Now, incidentally, that memorandum, did that have any reference whatsoever to the Evans case?

A Absolutely not.

Q How about after that, Mr. Slonaker, what involvement did you have in Senate Bill 12?

A I took the bill that Jim Kulp had drafted, sat down

with him. I think we made a few polishing changes to it, but it was essentially as he had drafted.

Q In 1981?

A '81.

I then worked with him to prepare the memorandum for Don Gehring, as per his request, to lay out why we felt legislation was needed and why it was needed as emergency legislation.

Q September 9th, 1982?

A That's correct, right.

Q Okay.

After that particular memorandum, did you have any other input in Senate Bill 12?

A Yes, I did. Mr. Gehring, as Deputy in charge of the Criminal Division, has primary responsibility on all legislation drafted by this division. He does, however, on all bills have some backup people, because occasionally he's required to be out of town and unavailable. So, he asked Jim Kulp and I to be the backup for that bill.

Now, I had some further involvement if you want me to go into that.

Q All right.

A The bill was called before the Senate Court of Justice Committee. I think that was on January 19th. Jim Kulp was going to testify before the Senate committee. He asked that I accompany him to the Senate committee so that I could—we could put our heads together if any question came up. He was to do the testimony. He did that. Subsequently, I was advised by the House to appear to testify. I did appear one date. The bill was not called. I had to go out of town and Jim Kulp appeared, but I don't think he testified. I

think the bill passed without any testimony being given in the House.

Q As it turned out, you never testified in reference to that?

A That's correct.

Q Do you know when the bill ultimately passed the General Assembly?

A Yes, I do, 12:44 p.m. on February 22nd.

Q All right.

Now, had there been any tracing mechanism, as far as you are concerned, as to where that bill was at any particular time, at any time during its pendency?

A I didn't know the time of passage back then. I learned this after these claims were made and there was a check made of the video tape of the session.

Q All right.

So, actually, on February 22nd, any time that day, essentially, you were not called or notified?

A As far as I know, I was not. I was not following that bill on any kind of daily basis at all.

Q And there was no mechanism to contact you whether it was passed or not?

A No.

Q Now, what is the process that a bill goes through from the time it leaves the General Assembly until it gets to the Governor for signature in emergency legislation?

A First, it goes through the Division of Legislative Service. They provide comment on whatever they think is appropriate. And then it comes to the Attorney General's Office for review. In this case, it was reviewed by Don Gehring, the

Deputy in charge of the division, and he indicated his approval and recommendation it be signed.

Q Did you have anything to do with that?

A Not that I recall.

Q Then where does it go?

A At that time, it goes to the Governor's Office and the Governor's staff then provide comment and then the Governor considers it.

Q During that period of time, was there any mechanism to inform you of what was happening at any particular time?

A No, there was not. As I best recall, I simply was informed in some informal fashion, and I don't know if it was a day after, two days after. But, anyway, during that time, someone just mentioned, "By the way, that bill was signed," something to that effect.

* * *

CROSS-EXAMINATION

BY MR. LABOWITZ:

Q Mr. Slonaker, my name is Ken Labowitz.

When was the first time you became aware of, for lack of a better term, the C, D, and E problem in this case, the two misdemeanors that became one misdemeanor resolution in the Circuit Court?

A When the *habeas corpus* petition was filed.

Q Does that mean the second one, in the spring of '82?

A I believe that's correct.

Q And the third *habeas corpus* in January of '83 then raised the separate issue of the uncounselled misdemeanors?

A That's right. Also, clarified some other allegations, one of them being a claim under *Estell* versus *Smith*, but yes, that's correct.

No. 84-1224

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WILBERT LEE EVANS,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

---

PETITIONER'S REPLY BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1224

WILBERT LEE EVANS, *Petitioner*,

v.

COMMONWEALTH OF VIRGINIA, *Respondent*.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

---

PETITIONER'S REPLY BRIEF

Petitioner respectfully files this reply to Respondent's Brief in Opposition to the Petition for a Writ of Certiorari.

I. REJECTION OF PETITIONER'S *EX POST FACTO* CLAIM WAS BASED ON FEDERAL LAW AND WAS IMPROPER

The gist of respondent's argument that Petitioner (also referred to hereinafter as "Evans") did not suffer a violation of the *ex post facto*, equal protection, and due process clauses of the United States Constitution is that the Virginia Supreme Court has the last word in this case, citing *Garner v. Louisiana*, 368 U.S. 157, 166

(1961). Opposition ("Opp.") 4-5, 7-10, 14. Under *Garner*, this Court is bound by a "State's interpretation of its own statute . . . ." *Id.* at 166. Because the issues Evans presents in his petition do not rest on an interpretation of a state statute, *Garner* is not applicable to the petition.[1]

Respondent blatantly misrepresents[2] the Virginia Supreme Court's holding in *Evans II*[3] by claiming that the court below decided "how the *Patterson* case and the former version of § 19.2-264.3 would have affected petitioner's case." Opp. 5. It did no such thing. The Virginia Supreme Court in *Evans II* reached its decision by analyzing and seeking to apply United States Supreme Court opinions to the facts of Evans' case. *See* App. 5a-7a. The Virginia Supreme Court in *Evans II* did not

[1] *See Michigan v. Long*, 103 S. Ct. 3469, 3476 (1983) ("when, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed the federal law required it to do so"); *California v. Ramos*, 103 S. Ct. 3446, 3451 n.7 (1983) (state supreme court's opinion clearly rested solely on federal constitution so no bar to review); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977) (state "court felt compelled by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did;" opinion below therefore reviewable); *Minnesota v. National Tea Co.*, 309 U.S. 551, 557 (1940) ("ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action").

[2] Among other flagrant mischaracterizations, respondent's quotation of the Virginia Supreme Court's holding on the *ex post facto* issue, which purports to paint Evans' claim as one resting on state law, omits through an ellipsis the essence of Evans' argument that resentencing him violated the United States Constitution. (*Compare* Opp. 5 (respondent's excerpts) *with* App. 5a (the actual Virginia Supreme Court opinion)).

[3] *See* App. 1a-15a.

attempt to interpret the *Patterson* case, the superseded capital punishment statute, or the Virginia state constitution in reaching its decision. Thus, respondent is seeking to preserve the opinion below behind an altogether inapposite jurisprudential shield.[4]

Notwithstanding respondent's effort to fit the present case into *Dobbert v. Florida*, 432 U.S. 282 (1977) and other authority on the *ex post facto* clause, respondent is not able to cite a single case in which a statutory scheme in place at the time of trial was replaced by a more severe scheme, and then applied retroactively. Moreover, *Dobbert* was misapplied below because the statutory amendment was neither "procedural"—it deprived Evans of his right to have the guilt-phase jury also decide his sentence—nor "ameliorative"—in contrast to the facts in *Dobbert*, here Evans would have had his sentence reduced under the prior statute had respondent disclosed its errors to the Virginia Supreme Court during Evans' direct appeal. Respondent's ultimate answer to these points is that certiorari should be denied because the Virginia Supreme Court disagreed with Evans.[5] This Court must

[4] If respondent's view of the law were correct, no state high court ruling would be subject to review by the United States Supreme Court. For example, under respondent's purported principle of appellate review, this Court could not have decided *Furman v. Georgia*, 408 U.S. 238 (1972), because the Georgia Supreme Court had held that the state's death penalty statute was constitutional. Such a contention regarding the finality of a state high court's interpretation of a state statute is obviously unfounded.

[5] A similar effort by respondent (*see* Opp. 5-6) to defeat Evans' arguments on purely technical grounds—Evans' asserted failure to raise below an issue raised in his petition—is also unavailing. Evans argued below that under the *ex post facto* clause he was entitled to a life sentence (Opp. Appendix 6), and that is precisely his contention here. (Ptn. 10.) Respondent confuses Evans' claim that he was denied the right to have the same jury that heard the guilt-phase evidence also determine his sentence with his claim that he had a right to receive an automatic life sentence pursuant to

make clear that states may not tread upon the *ex post facto* clause in the manner at issue here, nor may they do so without subjecting their actions to the scrutiny of this Court.

II. UNDER FEDERAL EQUAL PROTECTION LAW, WHICH WAS THE SOLE BASIS FOR THE OPINION BELOW, PETITIONER'S SENTENCE SHOULD HAVE BEEN REDUCED TO LIFE IMPRISONMENT

Respondent's equal protection argument, also relying heavily on *Garner v. Louisiana*, seeks to preclude review by this Court merely because the Virginia Supreme Court decided the equal protection issue adversely to petitioner. Opp. 9. Respondent's argument is no more persuasive here than it is regarding the *ex post facto* issue.[6] The court below, in rejecting petitioner's equal protection argument, did so based solely on its interpretation of *Dobbert*. It did not interpret one bit of Virginia law to reach its conclusion. This Court, not the Virginia Supreme Court, has the last word on whether the equal protection clause of the United States Constitution was violated.

Respondent does not deny that its trial counsel knowingly used false conviction records to persuade the jury to sentence Evans to death. It defends its continued reliance on the false records before the Virginia Supreme Court (in opposition to Evans' direct appeal) and in a

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Patterson v. Commonwealth, 222 Va. 653, 283 S.E.2d 212 (1981). *See* Opp. 5-6. Evans' position is, and has always been, as follows: First, the same jury that determined his guilt should also have determined his sentence. Second, *Patterson* made clear that when a sentencing jury became tainted, Evans could not be resentenced by the tainted or any other untainted jury, and instead had an immediate right to a court-imposed sentence of life imprisonment. 222 Va. at 660, 283 S.E.2d at 216.

[6] Indeed, in support of its effort to preclude review of the equal protection issue, respondent cites to a section of the Virginia Supreme Court's opinion below (App. 4a-5a) which is addressed exclusively to the *ex post facto* issue.

brief to this Court (in opposition to Evans' initial petition for a writ of certiorari), however, by arguing that the particular prosecutor at the appellate level who made these false representations was not aware, as was his trial prosecutor colleague, that they were false. Opp. 9 n.6. Respondent would have this Court hold that the state can free itself of the prejudicial error of one of its prosecutorial agents in a particular case (indeed, in a death penalty case) merely by the fortuity of assigning the appellate phase of the case to another prosecutorial agent who was unaware of the prejudicial error. Such an argument offends any sense of fundamental fairness and was long ago rejected by this Court. In *Giglio v. United States*, 405 U.S. 150 (1972), this Court held that a prosecutor's office is one entity. Prosecutors' offices have the responsibility to see that all relevant information on each case is communicated to every lawyer who deals with the case at any stage. *Id.* at 154. In *Santobello v. New York*, 404 U.S. 257 (1971),[7] the Court observed that the "staff lawyers in a prosecutor's office have the burden of 'letting the left hand know what the right is doing' *or has done*." *Id.* at 262 (emphasis added). In the present case, fundamental fairness requires that one prosecutor's knowledge that he used false conviction records to obtain the death penalty must be imputed to a colleague who is seeking to have the sentence affirmed on appeal. Ignorance of the error by the state's appellate counsel is no defense when its trial counsel was well aware of the dimensions of the misrepresentation.[8]

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[7] In *Santobello* the prosecution was held bound by an agreement made with a defendant by one prosecutor, even though the case was later handled by a second prosecutor unaware of the agreement. 404 U.S. at 262-63.

[8] The trial attorney who made the knowing misrepresentation was aware that the Virginia Supreme Court relied on the false conviction records in its opinion affirming Evans' death penalty. App. 55a-56a. He did nothing to alert other members of his office—or the court—to the error. As long ago as *Mooney v. Holohan*,

Respondent's final effort to preserve the result below is to argue, without any citation to precedential authority, that "it was entirely consistent with *Dobbert* to apply to Evans the law which was in effect at the time his death sentence was set aside and at the time of his resentencing proceeding." Opp. 13. Whether respondent's delay in confessing error was purposeful or not, the fact remains that under the law in effect from the commencement of Evans' trial until two years thereafter, respondent's knowing use of false conviction records would have resulted in an *automatic life sentence but for respondent's delay in confessing error.*[9] To draw a line between the defendant in *Patterson*, whose death sentence was reduced to life because the Virginia Supreme Court was alerted to the error related to his sentencing, and Evans, whose death sentence was not reduced because respondent compounded its error by misleading the Virginia Supreme Court in addition to the jury, is to undermine totally the significance of the equal protection clause as interpreted in *Dobbert*.

Consider what would have happened had respondent timely confessed error and thereby enabled Evans in his

---

294 U.S. 103 (1935), this Court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with "rudimentary demands of justice." *Id.* at 112. In *Napue v. Illinois*, 360 U.S. 264 (1959), the Court said, "[t]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Id.* at 269.

[9] Evans did not allege in his petition, as respondent contends, that "respondent purposefully delayed resolution of his habeas corpus proceedings so that his original death sentence would not be set aside until after the statutory amendment became effective." Opp. 9 n.6. In his petition Evans merely set forth the chronology of events and noted that in June 1982 respondent was challenged about its use of false evidence but that respondent did not confess its undisputed error until April 1983, two weeks after the emergency legislation was enacted.

original petition for a writ of certiorari filed with this Court (in February 1982) to call respondent to task for its use of the false conviction records? There can be little doubt that if respondent timely had admitted its error, Evans' death sentence would have been reduced in light of *Patterson*. Respondent is therefore rewarded by its failure to disclose timely its error if Evans' death sentence is permitted to stand. The Court should not tolerate such a result.

III. DUE PROCESS REQUIRED AN ACCURATE INSTRUCTION TO THE JURY THAT NONUNANIMITY AT THE SENTENCING PHASE WOULD RESULT IN A LIFE SENTENCE

As a matter of fundamental fairness and due process, Evans had a right to an instruction that if the jury was not unanimous as to the death sentence, nonunanimity would result in a life sentence. This was not solely a matter of Virginia law;[10] it implicated federal due process constitutional issues as well. When a death penalty statute, as here, makes specific provisions for a life sentence in the event of a nonunanimous jury,[11] and the jury is not so advised when it asks specifically about the consequences of nonunanimity, the defendant has been denied his federal due process right to have a jury fully

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[10] Respondent contends that under Virginia law, the verdict in criminal prosecutions must be unanimous. Opp. 13. This is true insofar as guilt or innocence is concerned, (*see* Virginia Code § 19.2-264.4(D) (1983) (verdict in all criminal prosecutions must be unanimous)), but neither the Virginia Supreme Court nor respondent cites any authority that would read this requirement applicable to death penalty proceedings, which are not themselves considered separate "prosecutions."

[11] When the jury asked whether a decision for life had to be unanimous, the trial court failed to advise the jury that Virginia law provided that if the jurors could not achieve unanimity, "the court shall dismiss the jury, and impose a sentence of imprisonment for life." Virginia Code § 19.2-264.4(E) (1983).

and accurately apprised of the governing law.[12] To paraphrase this Court's opinion in *Beck v. Alabama*, 447 U.S. 625 (1980), the failure to give the jury the option of nonunanimity inevitably enhances the risk of an unwarranted death sentence. *Id.* at 637.[13] "Such a risk cannot be tolerated in a case in which the defendant's life is at stake." *Id.* Such a denial of due process plainly may be, and should be, reviewed by this Court.

---

[12] *Cf. Beck v. Alabama*, 447 U.S. 625, 638 (1980) (statutory prohibition on giving lesser included offense instructions in capital cases violates due process clause by substantially increasing the risk of error in the factfinding process).

[13] *Cf. Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *Gardner v. Florida*, 430 U.S. 349 (1977); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

CONCLUSION

Respondent continually refers to the Virginia Supreme Court as "the final arbiter of Virginia law" (Opp. 5, 8, 10, 14), but such a characterization is irrelevant when it is precedent of this Court, not Virginia law, that was interpreted below. The *ex post facto* and equal protection issues raised in this case have broad implications for prisoners on death row throughout this country. This Court should provide guidance to state courts about how, given the variety of new death penalty statutes and the variations in timing that inevitably occur, the new statutes should apply to inmates tried under superseded statutes. The Court should also clarify the responsibility of trial judges to instruct juries accurately about the consequences of nonunanimity at sentencing in capital cases. For these reasons, petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Virginia.

Respectfully submitted,

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March 12, 1985

(5)

SUPREME COURT OF THE UNITED STATES

WILBERT LEE EVANS *v.* VIRGINIA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

No. 84–1224. Decided April 15, 1985

The petition for a writ of certiorari is denied.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

I continue to adhere to my view that the death penalty is under all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, and I would vacate the judgment of the Supreme Court of Virginia insofar as it left undisturbed the death sentence imposed in this case. *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting). However, even if I believed that the death penalty could constitutionally be imposed under certain circumstances, I would grant certiorari to decide the constitutional validity of the death sentence imposed here.

I

Petitioner Wilbert Lee Evans was convicted of capital murder in April 1981. At his sentencing hearing, the State urged the jury to recommend the death sentence based on Evans' "future dangerousness." To prove future dangerousness, the State relied principally upon the records of seven purported out-of-state convictions. The State's prosecutor later admitted that he knew, at the time he introduced the records into evidence, that two of them were false. App. to Pet. for Cert. 50a–52a. One of the seven "convictions," for assault on an officer with a deadly weapon, had been dismissed on appeal. Another, for engaging in an affray with a deadly weapon, had been vacated on appeal, and Evans had been reconvicted in a trial *de novo;* the conviction for one crime was, however, counted as two convictions.[1] After

[1] In addition, several of the other convictions had been obtained when

5 pp

considering Evans' prior "history," the jury determined that there was a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society, see Va. Code § 19.2–264.4C (1983), and it recommended the death penalty based solely upon its finding of future dangerousness. *Evans* v. *Commonwealth*, —— Va. ——, 323 S. E. 2d 114 (1984). Evans was sentenced to death on June 1, 1981.

On October 16, 1981, while Evans' direct appeal was pending, the Supreme Court of Virginia ruled that, when a capital defendant's right to a fair and impartial jury is violated during the sentencing phase of trial, a death sentence must be commuted to life imprisonment. *Patterson* v. *Commonwealth*, 222 Va. 653, 283 S. E. 2d 212 (1981). The court premised its decision on a construction of the then-existing death-penalty statute under which only the jury that finds a capital defendant guilty can fix his punishment. Because the original jury, tainted by the constitutional error, could not be reconvened to re-sentence the defendant, the death sentence had to be reduced automatically to life imprisonment. *Id.*, at 660, 283 S. E. 2d, at 216.

This ruling was in effect when the Virginia Supreme Court considered Evans' direct appeal. Therefore, had that court known of the error in the sentencing hearing and vacated Evans' death sentence, he would very likely have received a life sentence.[2] But the State not only failed to confess its error, it listed all the purported convictions, including the erroneous ones, in its brief. App. to Pet. for Cert. 42a. In

Evans was without the benefit of counsel. App. to Pet. for Cert. 3a–4a.

[2] In its brief in opposition, the State urges that the opinion of the Virginia Supreme Court implied that the court would not have applied the *Patterson* rule to Evans' sentence. A fair reading of the opinion below, however, indicates that the court was not rejecting Evans' contention that *Patterson* would have controlled his case had it not been legislatively overruled; rather, the court was rejecting Evans' *ex post facto* argument, which was based on the subsequent overruling of *Patterson*. See *Evans* v. *Commonwealth*, —— Va. ——, 323 S. E. 2d 114, —— (1984).

sustaining Evans' death sentence, the State Supreme Court relied, in part, on this inaccurate record. *Id.*, at 31a. When Evans petitioned this Court for a writ of certiorari, the State again relied on the misleading records of convictions in its brief in opposition. *Id.*, at 46a. Certiorari was denied. 455 U. S. 1038 (1982).

The State did not notify Evans that it would confess its error regarding the false evidence until March 28, 1983. App. to Pet. for Cert. 73a. *On that day*, the Virginia Governor signed into law a bill that amended the state death-penalty statute to allow for resentencing by a different jury after a death sentence was set aside, thus effectively overruling *Patterson*. See Va. Code § 19.2–264.3C (1983). The State subsequently confessed error to the trial judge on April 12, 1983. At a hearing to consider the propriety of resentencing Evans, the prosecutor at Evans' trial admitted that he knew the evidence that he introduced at the sentencing hearing was false. The judge then ordered a new sentencing hearing. A new jury recommended the death penalty, and petitioner was again sentenced to death.

II

In *Napue* v. *Illinois*, 360 U. S. 264 (1959), this Court reversed a conviction obtained through the use of false evidence that was known to be false by representatives of the State. Since *Napue*, this Court has adhered to the principle that a conviction obtained by the knowing use of false evidence is fundamentally unfair. See, *e. g.*, *United States* v. *Agurs*, 427 U. S. 97, 103 (1976); *Miller* v. *Pate*, 386 U. S. 1, 7 (1967). The rule of *Napue* is undoubtedly applicable to the sentencing phase of a capital trial. In this case, the prosecutor admitted that he knowingly introduced false evidence at Evans' sentencing hearing to demonstrate "future dangerousness." Evans was therefore deprived of the fundamental fairness due him under the Fourteenth Amendment.

To remedy this injury, the state court ordered a new sentencing hearing free from the taint of false evidence. This remedy, however, was inadequate to undo the harm suffered by Evans. For the State compounded its original misconduct by concealing the deception during both Evans' direct appeal and his petition for certiorari to this Court. Had the State honestly confessed the error, petitioner's sentence would almost certainly have been commuted to life imprisonment under the then-existing statute. Instead, the State did not confess error until nearly two years after the original death sentence had been imposed, by which time the death-penalty statute had been amended.

The court below ruled that, even assuming that the prosecutor's handling of the sentencing hearing involved serious prosecutorial misconduct, the State was not barred from seeking the death penalty a second time. In doing so, it relied on the holding in *United States* v. *Morrison*, 449 U. S. 361 (1981), that drastic remedies should not be used to redress "deliberate" and "egregious" violations of constitutional rights "absent demonstrable prejudice, or substantial threat thereof," to the defendant. *Id.*, at 365. The court concluded that Evans' resentencing hearing removed any prejudice. But the court considered only the prejudice suffered by Evans at the initial sentencing. It failed to account for the harm done to Evans afterwards, during his direct appeal. Had the State not continued to rely on the false evidence, very likely the death sentence would have been commuted to life imprisonment.

The State argues, nevertheless, that this Court cannot consider the harm done to Evans by its conduct during the appeal. It directs our attention to the finding by the trial judge that the State did not delay its confession of error until after the death-penalty statute was amended just to have a second chance to sentence Evans to death. App. to Pet. for Cert. 20a. This argument misses the point. Regardless of its purpose in regard to the amendment, the State's continued, knowing use of false evidence during the direct appeal and petition for certiorari, and its failure to disclose this misconduct, constituted egregious conduct that seriously harmed Evans.[3]

III

To my mind, the only way to remedy the federal constitutional violation Evans has suffered would be for the Virginia courts to consider, *nunc pro tunc*, how *Patterson* would have applied to this case. I would grant the petition for certiorari to consider whether the court below was constitutionally obligated to make this inquiry. Accordingly, I dissent from the denial of certiorari.

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[3] Further, whether the delay of nearly two years in confessing error was intentional or merely negligent has no bearing on the degree of prejudice suffered by Evans. "Clearly, a deliberate attempt by the government to use delay to harm the accused, or governmental delay that is "purposeful or oppressive," is unjustifiable. . . . The same may be true of any governmental delay that is unnecessary, whether intentional or negligent in origin." *Dickey* v. *Florida*, 398 U. S. 30, 51 (1970) (BRENNAN, J., concurring).

Nor does it matter whether the state attorney who appeared at the sentencing hearing, and who admitted that he knew the evidence on which the State relied was false, took part in preparing the State's briefs in the Virginia Supreme Court or in this Court. The prosecutor's office is an entity, not just a group of isolated individuals, and the prosecutor is responsible for assuring that relevant information is communicated among the lawyers in the office. See *Giglio* v. *United States*, 405 U. S. 150, 154 (1972); *Moore* v. *Illinois*, 408 U. S. 786, 810 (1972) (MARSHALL, J., concurring in part and dissenting in part).